

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AUGUST 10, 2021

**MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170**

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OF
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¹Retired 31 December 2020. ²Appointed Chief Judge 30 December 2020 and sworn in 1 January 2021. ³Retired 31 December 2020.

⁴Resigned 31 December 2020. ⁵Term ended 31 December 2020. ⁶Term ended 31 December 2020. ⁷Sworn in 1 January 2021.

⁸Sworn in 1 January 2021. ⁹Sworn in 1 January 2021. ¹⁰Sworn in 1 January 2021. ¹¹Appointed 30 December 2020 and sworn in 6 January 2021.

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FILED 1 DECEMBER 2020

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APPEAL AND ERROR

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Interlocutory order—motion to dismiss third-party complaint for lack of jurisdiction and improper venue—right of immediate appeal—In a contract action in which a related suit was already pending in a Georgia court, the trial court's order denying a third-party defendant's motion to dismiss for lack of personal jurisdiction and improper venue was immediately appealable as affecting a substantial right. **Peter Millar, LLC v. Shaw's Menswear, Inc., 383.**

APPEAL AND ERROR—Continued

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Preservation of issues—sufficiency of evidence—motion to dismiss—preserves all related issues—In a prosecution for second-degree kidnapping, where defendant moved to dismiss the charge for insufficient evidence of the “consent” element, defendant did not waive appellate review of his argument challenging the sufficiency of the evidence for the “removal” element. Appellate Rule 10(a)(3) does not require a defendant to assert a specific ground for a motion to dismiss for insufficiency of the evidence, and therefore defendant's motion preserved for appellate review all issues related to sufficiency of the evidence. **State v. Parker, 464.**

ATTORNEY FEES

Custody action—father to pay mother's attorney fees—N.C.G.S. § 50-13.6—sufficiency of findings and conclusions—In a child custody action, the trial court did not err by ordering the father to pay the mother's attorney fees where the court's findings and conclusions were in accordance with N.C.G.S. § 50-13.6. The unchallenged findings showed that the mother was awarded child support and arrears, acted in good faith, had insufficient means to defray the costs of the action, and incurred reasonable attorney fees, while the father failed to pay adequate child support and had the ability to pay attorney fees. **Ward v. Halprin, 494.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Remand—failure to comply with mandate—two juvenile petitions—The trial court erred in a juvenile case by failing to comply with the mandate of the Court of Appeals on remand. Instead of requiring the department of social services to present sufficient evidence to adjudicate the child neglected under the second juvenile petition, the trial court dismissed the second juvenile petition and allowed the department of social services to pursue a motion for review filed on the first juvenile petition. The matter was remanded for the trial court to comply with the previous mandate of the Court of Appeals. **In re K.S., 358.**

Subject matter jurisdiction—termination—two juvenile petitions—The Court of Appeals rejected an argument that the trial court lacked subject matter jurisdiction to terminate the guardianship of a minor child's grandparents on remand at a permanency planning hearing. The trial court's jurisdiction began with the filing of the first petition alleging the child to be neglected, and subsequent events—including the trial court's release of the department of social services from further reviews,

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

the Court of Appeals' reversal of the trial court's adjudication and disposition orders on a second petition, and the trial court's purported dismissal of the second petition—did not terminate the trial court's subject matter jurisdiction. **In re K.S., 358.**

CHILD CUSTODY AND SUPPORT

Custody order—joint legal custody—mother given final decision-making authority regarding major issues—In a custody matter in which the trial court gave two parents joint legal custody of their children but primary physical custody to the mother, the trial court did not err by giving the mother final decision-making authority over major issues with regard to the children in the event the parents could not reach a mutual agreement. The court's determination that giving the mother final authority over certain decisions was in the children's best interest was supported by its findings of fact, which included details about the parents' inability to communicate and co-parent and the effect of that inability on the children. **Ward v. Halprin, 494.**

CONSTITUTIONAL LAW

Effective assistance of counsel—counsel's failure to stipulate to prior conviction—sufficiency of record on appeal—On appeal from convictions for possession of a firearm by a felon and other crimes, where defendant argued that his trial attorney rendered ineffective assistance of counsel by failing to stipulate to defendant's prior conviction for felony larceny (thereby enabling the State to introduce evidence of that prior conviction in order to prove defendant's status as a felon—an essential element of the possession charge), the record on appeal was insufficient to permit meaningful review of defendant's argument. Consequently, defendant's ineffective assistance of counsel claim was dismissed without prejudice to his right to reassert the claim in a motion for appropriate relief before the trial court. **State v. Parker, 464.**

CONTEMPT

Criminal contempt—appeal to superior court for de novo review—testimony of district court judge—Rule 605—no neutral or disinterested witness requirement—In the appeal of a district court criminal contempt order to the superior court for a de novo hearing, the superior court did not err by hearing testimony from the district court judge who entered the contempt order. There was no violation of Evidence Rule 605 because the district court judge was not the presiding judge in superior court. Further, even if the district judge was not a neutral or disinterested witness, such witnesses are not prohibited from testifying. **State v. Wendorf, 480.**

Criminal contempt—district court failure to indicate contempt based on reasonable doubt standard—jurisdiction in superior court—In a case where defendant was held in criminal contempt in district court when she failed to appear after being subpoenaed as a witness, the district court's failure to indicate in its order that it was holding defendant in criminal contempt based on the reasonable doubt standard of proof did not deprive the superior court of jurisdiction on appeal from the district court's order. **State v. Wendorf, 480.**

Criminal contempt—findings of fact—supported by the evidence—In a case where defendant was found in criminal contempt for failure to appear after being subpoenaed as a witness in a trial for assault on a female, there was competent evidence to support the trial court's findings that defendant was served with a subpoena

CONTEMPT—Continued

instructing her to appear in court, she failed to appear on the date required, and her failure to appear was willful. The testimony showed that the district attorney's office had been in contact with defendant, defendant was personally served with the subpoena, defendant did not answer when the district attorney asked for victims and witnesses to answer during calendar call, and defendant never stood up or identified herself at any time during the criminal session of court. **State v. Wendorf, 480.**

Criminal contempt—show cause order—pleading requirements—jurisdiction—In a criminal contempt case where defendant failed to appear after being subpoenaed as a witness in an assault on a female trial, the show cause order issued in district court was not facially defective for an alleged failure to comply with the pleading requirements of N.C.G.S. § 15A-924(a)(5) and the trial court had jurisdiction to find defendant in criminal contempt. The requirements of section 15A-924(a)(5) do not apply to proceedings for criminal contempt and the notice requirements for criminal contempt are less demanding than for ordinary criminal cases. **State v. Wendorf, 480.**

Criminal contempt—subpoena—failure to appear—Defendant's failure to appear after being subpoenaed to testify in a trial for assault on a female could be punished as criminal contempt since it constituted a willful disobedience of, resistance to, or interference with a court's lawful process under N.C.G.S. § 5A-11(a)(3). **State v. Wendorf, 480.**

CRIMINAL LAW

Jury instructions—acting in concert—supported by the evidence—In a case involving first-degree felony murder, the trial court did not err—much less commit plain error—by instructing the jury on the doctrine of acting in concert where the evidence showed defendant and another man were instructed by defendant's brother to collect a drug debt, the two men drove to a parking lot near the house where the victim was on the back porch, the men were captured on video walking to the house, defendant entered the house and gunshots were fired, the two men ran to the car, and the other man drove defendant from the scene. **State v. Dove, 417.**

EVIDENCE

Authentication—screenshots of social media posts—photographs and written statements—circumstantial evidence—In a prosecution for defendant's violation of a domestic violence protective order, screenshots of social media posts were properly admitted where sufficient circumstantial evidence authenticated the screenshots as both photographs and written statements. The victim gave sufficient testimony that she had taken the screenshots and that defendant was the person who had made the comments—even though the comments were made through their daughter's account, the evidence permitted the reasonable conclusion that defendant had access to the daughter's account and wrote the comments after he was released from jail. **State v. Clemons, 401.**

Authentication—standard of review—de novo—The Court of Appeals reviewed the state's case law and held that the appropriate standard of review for authentication of evidence is de novo. **State v. Clemons, 401.**

Hearsay—statements from neighbor regarding second break-in—present sense impression exception—In a prosecution for felony breaking and entering

EVIDENCE—Continued

and felony larceny, the trial court did not err by admitting statements made by a nearby resident—whose house had also been broken into on the same morning and one street over from the break-in that gave rise to the charged offenses—to law enforcement because the statements qualified under the present sense impression exception to the hearsay rule (Evidence Rule 803(1)). The statements were made within minutes after the resident was aware that his house had been broken into, and the resident made the statements in an agitated and angry manner. **State v. Grady, 429.**

Other crimes, wrongs, or acts—uncharged similar crime—Rules 403 and 404(b)—chain of events—no unfair prejudice—In a prosecution for felony breaking and entering and felony larceny, there was no error in the admission of evidence regarding an uncharged breaking and entering that occurred on the same morning and one street over from the crimes for which defendant was on trial. The evidence was admissible under Evidence Rule 404(b) because it was not admitted solely to show defendant's propensity to commit the charged offenses, but depicted a chain of events that tended to show the same person committed the two break-ins in close temporal and spatial proximity. Moreover, the evidence was not unfairly prejudicial and therefore did not have to be excluded pursuant to Evidence Rule 403. **State v. Grady, 429.**

Relevance—sexual offenses against a child—immigration status of victim's mother—In a prosecution for first-degree statutory sexual offense and taking an indecent liberty with a child, the trial court did not err by precluding defendant from cross-examining the victim's mother about her immigration status, where defendant argued at trial that the mother—an illegal immigrant—had a motive to fabricate the sexual abuse allegations in order to apply for a U Visa. Under Evidence Rule 401, the mother's immigration status was irrelevant to the issue of whether any sexual abuse occurred, and defendant could not support his theory about the mother's credibility because she never applied for a U Visa. **State v. Lopez, 439.**

Rule 403—testimony—defendant's refusal to test for sexually transmitted disease—sexual offenses against a child—In a prosecution for first-degree statutory sexual offense and taking an indecent liberty with a child, the trial court did not abuse its discretion by allowing the victim's mother to testify that defendant refused to get tested for herpes after the victim had tested positive for herpes. Although defendant eventually got tested pursuant to a search warrant, the mother said nothing about defendant's positive test results, which the trial court had already excluded under Evidence Rule 403 because the results did not show whether defendant had the same type of herpes as the victim; therefore, the mother's testimony did not create a danger of unfair prejudice. **State v. Lopez, 439.**

Witness testimony—lack of first-hand knowledge—prejudice analysis—The trial court erred in a first-degree felony murder trial by allowing a lay witness to testify that she believed defendant was holding a gun in a surveillance video where her opinion was based on her viewing of the video and not based on first-hand knowledge or perception, and she was in no better position than the jury to determine if defendant was holding a gun. However, the error was not prejudicial because there was substantial other evidence of defendant's guilt, and the prosecutor only asked the witness once about what the defendant was holding in the video. **State v. Dove, 417.**

FIREARMS AND OTHER WEAPONS

Possession of firearm—sufficiency of evidence—circumstantial evidence—In a prosecution for felony breaking and entering and felony larceny, the trial court properly denied defendant's motion to dismiss a charge of possession of a firearm by a felon where there was sufficient evidence, albeit circumstantial, that defendant possessed a bag holding three guns that were taken during a house break-in. Surveillance video near the house showed an empty-handed man (later identified as defendant) approaching the house and then, shortly afterward, leaving with a bag that had items sticking out of it; soon after that, law enforcement met the owner at the house, and the owner discovered his three guns were missing. **State v. Grady, 429.**

GUARDIAN AND WARD

Chapter 35A guardianship proceeding—Rules of Evidence—applicability—admission or exclusion of evidence—prejudice—In a guardianship case filed by a minor child's grandparents, where the superior court upheld the assistant clerk of court's appointment of the child's stepfather as the child's legal guardian, the court erred in concluding that the North Carolina Rules of Evidence did not apply to Chapter 35A minor guardianship proceedings. However, neither this error nor any resultant admission or exclusion of evidence amounted to prejudicial error because, even setting aside any findings of fact that relied upon evidence the grandparents challenged on appeal, the unchallenged findings of fact by both the assistant clerk and the superior court supported the guardianship appointment. **In re R.D.B., 374.**

JURISDICTION

Contract dispute—related suit pending in another state—motion to stay granted—abuse of discretion analysis—In a contract action initiated by a North Carolina clothing manufacturer to collect a past due account from a Georgia clothing wholesaler, the trial court did not abuse its discretion by granting the wholesaler's motion to stay where the wholesaler had a pending related suit in Georgia (for breach of consignment agreements) against a Florida clothing retailer that held inventory made by the North Carolina manufacturer. Sufficient evidence was presented to support the court's determination that a substantial injustice would result if the North Carolina suit were permitted to go forward (pursuant to N.C.G.S. § 1-75.12(a)), due to the risk that inconsistent judgments might result from simultaneous proceedings in two different states regarding the same contractual issue. **Peter Millar, LLC v. Shaw's Menswear, Inc., 383.**

Personal—long-arm statute—commercial transactions—lack of direct contact between nonresident retailer and North Carolina manufacturer—In a contract action initiated by a North Carolina manufacturer against a Georgia wholesaler to collect on a past due account, in which the wholesaler filed a third-party complaint against a Florida retailer that held the manufacturer's inventory, the wholesaler (as third-party plaintiff) failed to demonstrate the Florida retailer had sufficient direct contacts with the North Carolina manufacturer to be subjected to jurisdiction under this State's long-arm statute (N.C.G.S. § 1-75.4(5)(d)). The evidence showed that none of the manufacturer's shipments to the retailer were at the retailer's order or direction, but were instead directed by the wholesaler, and all orders and directions regarding the inventory occurred in either Florida or Georgia. The matter was remanded with instruction for the trial court to enter an order dismissing the third-party complaint for lack of personal jurisdiction. **Peter Millar, LLC v. Shaw's Menswear, Inc., 383.**

KIDNAPPING

Second-degree—removal of person from one place to another—by fraud or trickery—sufficiency of evidence—The trial court properly denied defendant's motion to dismiss a charge of second-degree kidnapping where the State presented substantial evidence that defendant, under the pretext of giving his cousin a ride to the cousin's community college, fraudulently induced his cousin to enter his car so that defendant could rob the cousin at gunpoint in a secluded location. Despite inconsistent testimony about whether it was defendant or his girlfriend who drove the car (which, at any rate, was for the jury to resolve and did not require dismissal), the evidence of defendant's use of fraud or trickery was enough to satisfy the "unlawful removal" element of second-degree kidnapping. **State v. Parker, 464.**

SENTENCING

Felony embezzlement—aggravating factor—taking of property of great monetary value—ratio of amount embezzled to threshold amount of offense—In a case where defendant was convicted of eight counts of embezzlement of property received by virtue of office or employment, the trial court did not err by applying the aggravating factor of "taking of property of great monetary value" when it sentenced defendant for one of the convictions—a conviction for Class C felony embezzlement of more than \$100,000. Defendant's conviction on that charge was based on her embezzlement of \$202,242.62, and the ratio between the amount embezzled and the statutory threshold, as well as the total amount of money embezzled, supported application of the aggravating factor. **State v. Gamble, 425.**

SEXUAL OFFENDERS

First-degree statutory sexual offense—sexual act—penetration—sufficiency of evidence—The trial court properly denied defendant's motion to dismiss a charge of first-degree statutory sexual offense where there was sufficient evidence of penetration needed to establish the "sexual act" element of the crime. Specifically, the victim testified that defendant touched her with his fingers "in the inside" in "the place where she goes pee." **State v. Lopez, 439.**

UNEMPLOYMENT COMPENSATION

Disqualification from benefits—voluntary resignation—good cause attributable to employer analysis—The determination that petitioner was ineligible for unemployment benefits was affirmed where he failed to show that his good cause for leaving his job—he resigned because pain in his knees made it difficult to do security system installations—was attributable to the employer (as required by N.C.G.S. § 96-14.5(a)). The evidence showed petitioner's job duties (which included installations) did not change from the time he began his employment until his resignation, the employer tried to limit the number of installation jobs assigned to petitioner and provided technicians to assist him on larger installs, petitioner provided no medical restrictions to the employer and did not make any formal requests for workplace accommodations, and the employer could not provide administrative work because that work was only available out-of-state. **In re Lennane, 367.**

VENUE

Forum selection clause—stipulation to clause being mandatory—enforceability—remand for entry of order dismissing action—In a contract action

VENUE—Continued

initiated by a North Carolina manufacturer against a Georgia wholesaler to collect on a past due account, where the wholesaler filed a third-party complaint against a Florida retailer that held the manufacturer's inventory, and where the wholesaler and retailer stipulated that their consignment agreement's forum selection clause was mandatory (listing Georgia as the proper forum for disputes), the Court of Appeals applied Georgia law and concluded that the clause was valid and enforceable. The wholesaler presented no evidence that litigating the matter in Georgia would be inconvenient—not only had the wholesaler drafted the forum selection clause but also it had availed itself of the clause by initiating a suit against the retailer in Georgia. The matter was remanded with instruction for the trial court to enter an order dismissing the third-party complaint for improper venue. **Peter Millar, LLC v. Shaw's Menswear, Inc.**, 383.

SCHEDULE FOR HEARING APPEALS DURING 2021
NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 11 and 25

February 8 and 22

March 8 and 22

April 12 and 26

May 10 and 24

June 7

August 9 and 23

September 6 and 20

October 4 and 18

November 1, 15, and 29

December 13

Opinions will be filed on the first and third Tuesdays of each month.

IN RE K.S.

[274 N.C. App. 358 (2020)]

IN THE MATTER OF K.S.

No. COA20-37

Filed 1 December 2020

1. Child Abuse, Dependency, and Neglect—subject matter jurisdiction—termination—two juvenile petitions

The Court of Appeals rejected an argument that the trial court lacked subject matter jurisdiction to terminate the guardianship of a minor child's grandparents on remand at a permanency planning hearing. The trial court's jurisdiction began with the filing of the first petition alleging the child to be neglected, and subsequent events—including the trial court's release of the department of social services from further reviews, the Court of Appeals' reversal of the trial court's adjudication and disposition orders on a second petition, and the trial court's purported dismissal of the second petition—did not terminate the trial court's subject matter jurisdiction.

2. Child Abuse, Dependency, and Neglect—remand—failure to comply with mandate—two juvenile petitions

The trial court erred in a juvenile case by failing to comply with the mandate of the Court of Appeals on remand. Instead of requiring the department of social services to present sufficient evidence to adjudicate the child neglected under the second juvenile petition, the trial court dismissed the second juvenile petition and allowed the department of social services to pursue a motion for review filed on the first juvenile petition. The matter was remanded for the trial court to comply with the previous mandate of the Court of Appeals.

Appeal by respondents from orders entered 4 October 2019 by Judge Sarah C. Seaton in Onslow County District Court. Heard in the Court of Appeals 3 November 2020.

Mercedes O. Chut, P.A., by Mercedes O. Chut, for respondent-appellant Shonna Schindler.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender J. Lee Gilliam, for respondent-appellant Jason Schindler.

Onslow County Department of Social Services, by Richard Penley, for petitioner-appellee Onslow County Department of Social Services.

IN RE K.S.

[274 N.C. App. 358 (2020)]

Matthew D. Wunsche for appellee Guardian ad Litem.

ARROWOOD, Judge.

Jason Schindler (“Mr. Schindler”) and Shonna Schindler (“Mrs. Schindler”) (collectively, the “Schindlers”) appeal from orders entered 4 October 2019 terminating their guardianship of their juvenile grandchild, K.S. (“Kaitlyn”).¹ On appeal, the Schindlers challenge only the termination of their guardianship as to Kaitlyn. For the reasons discussed herein, we reverse the orders entered 4 October 2019 and remand this matter to the trial court to proceed in accordance with the mandate of this Court.

I. Background

This case involves a prior appellate decision handed down by this Court on 3 July 2018 and subsequent orders entered by the trial court following remand. It appears the trial court and the Onslow County Department of Social Services (“DSS”) attempted to execute a short cut to reach a preferred result while bypassing the clear and direct mandate of this Court. If the correct procedure had been followed, this appeal would be unnecessary.

Below, in addition to issues pertinent to the instant appeal, we recite many of the same facts and procedural events discussed in our prior decision. *Matter of M.N.*, 260 N.C. App. 203, 816 S.E.2d 925 (2018).

Kaitlyn was born in August 2007. Three months later, on 16 November 2007, DSS filed a juvenile petition alleging Kaitlyn to be neglected (the “First Petition”).

On 11 December 2007, the trial court adjudicated Kaitlyn neglected and abused, and granted physical custody of Kaitlyn to her maternal grandmother, Mrs. Schindler. Additional orders continuing Mrs. Schindler’s physical custody of Kaitlyn were entered on 12 March and 18 April 2008.

On 19 September 2008, and by orders entered that day and on 4 February 2009, the trial court changed the plan to relative custody and granted primary legal and physical custody of Kaitlyn to both Mr. and Mrs. Schindler and secondary legal and physical custody to the paternal grandmother. Reunification efforts with Kaitlyn’s biological

1. Pseudonyms are used throughout the opinion to protect the identity of the juveniles and for ease of reading.

IN RE K.S.

[274 N.C. App. 358 (2020)]

mother were ceased at this time.² Subsequently, on 16 September 2009, the trial court entered an order (the “Guardianship Order”) granting the Schindlers legal guardianship of Kaitlyn and “ceasing further reviews in this matter.” *Id.* at 204, 816 S.E.2d at 927 (quotation marks omitted).

Nothing further was filed concerning Kaitlyn until 12 July 2016, when DSS filed a second petition alleging neglect and dependency stemming from the Schindlers’ arrests on multiple drug-related charges (the “Second Petition”). The Second Petition differs from the First Petition insofar as the former alleges that Kaitlyn was neglected *and* dependent, and also offers different facts to support the allegations of neglect. Furthermore, the Second Petition, unlike the First Petition, related not only to Kaitlyn but also to two additional grandchildren and includes the Schindlers as respondents (and not the biological mother). Following several continuances, and a handful of non-secure custody hearings, the trial court held an adjudicatory hearing on the Second Petition on 13 February 2017. DSS dismissed its allegation of dependency and sought adjudication only on the issue of neglect. Following the hearing, on 9 March 2017, the trial court entered an order adjudicating Kaitlyn and two of her siblings neglected and dependent, notwithstanding DSS’ dismissal of the latter ground. On 9 November 2017, the trial court entered a corrected order adjudicating Kaitlyn neglected and acknowledging the dismissal of the allegations of dependency (the “Adjudication Order”). In the Adjudication Order, the trial court found that the Schindlers were granted guardianship of Kaitlyn as of 16 September 2009, the date of the Guardianship Order. The Adjudication Order states that DSS removed the juveniles from respondents’ custody and maintained full legal custody of the juveniles (including Kaitlyn) with full placement authority.

Following a dispositional hearing on 7 June 2017, the trial court entered an order on 14 November 2017 terminating the Schindlers’ guardianship of Kaitlyn (the “Disposition Order”). Kaitlyn and the other juveniles were to remain in the custody of DSS. The Schindlers appealed the Adjudication Order (9 November 2017) and the Disposition Order (14 November 2017).

On 3 July 2018, this Court reversed the Adjudication and Disposition Orders with respect to the adjudication and disposition of Kaitlyn only, as the “trial court failed to make sufficient findings of fact in its adjudication order to support the conclusion that Kaitlyn is a neglected juvenile, [and] because no evidence was introduced to support those necessary findings of fact[.]” *Id.* at 208, 816 S.E.2d at 929. In addition, the Court

2. Kaitlyn’s biological father is deceased.

IN RE K.S.

[274 N.C. App. 358 (2020)]

remanded the action for further proceedings “not inconsistent with th[e] opinion.” *Id.*

On 3 July 2018, the same day this Court filed its opinion, DSS filed a motion for review seeking to conduct a permanency planning hearing and to terminate the Schindlers’ guardianship of Kaitlyn. DSS alleged that the Schindlers, Kaitlyn’s maternal grandparents, continued to have substance abuse problems, specifically abusing heroin, oxycodone, and suboxone. DSS also asserted that the Schindlers had tested positive for unprescribed controlled substances and accumulated drug charges while Kaitlyn was in their care.

On 4 October 2018, Mr. Schindler filed a motion raising, among other things, the affirmative defenses of *res judicata* and estoppel as it related to the prior adjudications and the 3 July 2018 motion filed by DSS. Mrs. Schindler orally joined the motion at a hearing held 8 October 2018.

On 14 December 2018, the trial court conducted a hearing to address the opinion of this Court as well as the motion filed by Mr. Schindler on 4 October 2018. In an order dated 4 October 2019 (“Juvenile Order I”), the trial court concluded that this Court had remanded the case for “further proceedings on findings of fact.” The trial court also determined that it retained original and exclusive jurisdiction over the case. More importantly, Juvenile Order I provided DSS with the option of addressing the matter on remand for further findings of fact as to the adjudication of Kaitlyn as a neglected juvenile or, alternatively, proceeding with its motion for review. The trial court explained that “[a]n action for petition to find a juvenile to be abused, neglected or dependent is a separate action altogether from a motion for review to terminate guardianship[.]” As such, the trial court decided that a “motion for review is the proper form of pleading to seek to terminate the guardianship of the Schindlers.” The district court also denied the Schindlers’ motion regarding *res judicata* and estoppel holding that these principles did not apply to a motion for review seeking to terminate guardianship.

On 24 April 2019, the trial court conducted a hearing pursuant to “N.C. Gen. Stat. §§ 7B-600 and 7B-906.1 on the motion for review/permanency planning” filed by DSS. As mentioned, DSS had previously filed a motion for review seeking to conduct a permanency planning hearing to terminate the Schindlers’ guardianship of Kaitlyn on 3 July 2018. At the hearing, the Schindlers renewed their objections regarding their previous motions to dismiss based on *res judicata*, collateral estoppel, and violations of due process. The trial court overruled their objections as those issues had already been resolved by virtue of Juvenile Order I.

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The trial court also acknowledged that DSS had opted not to proceed to adjudication on the Second Petition and that DSS was not offering any further evidence or argument with respect to the same. The trial court concluded that DSS had instead “elected to proceed with the motion for review/permanency planning hearing as permitted under [N.C. Gen. Stat. §] 7B-600 to review the court ordered guardianship of the juvenile with the [Schindlers].” For this reason, the trial court purported to dismiss the Second Petition as well as the associated Adjudication and Disposition Orders as they related to Kaitlyn.

Following the 24 April 2019 hearing, the trial court entered another order filed 4 October 2019³ (“Juvenile Order II”) terminating the Schindlers’ guardianship of Kaitlyn and espousing a new permanent plan of guardianship for the juvenile with a secondary plan of custody with a court-approved caretaker. The Schindlers appealed Juvenile Orders I and II.

II. Discussion

[1] The Schindlers raise several issues on appeal. Collectively, the Schindlers contend that the trial court lacked subject matter jurisdiction to terminate their guardianship of Kaitlyn on remand at a permanency planning hearing. In addition, the Schindlers contend that the trial court failed to comply with the North Carolina Rules of Evidence at the review hearings held on remand and consequently allowed the entry of inadmissible evidence that was insufficient to support the findings of fact and conclusions of law in Juvenile Orders I and II.⁴ The Schindlers also assert that the trial court’s proceedings on remand were inconsistent with this Court’s mandate and opinion filed 3 July 2018.

A. Subject Matter Jurisdiction

The Schindlers contend that the trial court lacked authority and jurisdiction to terminate their guardianship of Kaitlyn on remand at a hearing held pursuant to N.C. Gen. Stat. §§ 7B-600, 7B-906.1 (2019).

We review challenges to subject matter jurisdiction *de novo*. *In re K.A.D.*, 187 N.C. App. 502, 503, 653 S.E.2d 427, 428 (2007) (citing *Raleigh Rescue Mission, Inc. v. Bd. of Adjust. of Raleigh*, 153 N.C. App. 737, 740, 571 S.E.2d 588, 590 (2002)).

3. The district court entered two separate orders on 4 October 2019 memorializing its findings of fact and conclusions of law from the hearings held on 14 December 2018 and 24 April 2019.

4. The Schindlers also proffer arguments based on *res judicata*, collateral estoppel, and the law of the case doctrine. In light of our holdings below, we do not reach these issues.

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Pursuant to North Carolina Juvenile Code, trial courts have “exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent.” N.C. Gen. Stat. § 7B-200(a) (2019). This jurisdiction extends to guardians, as well. *See id.* at § 7B-200(b).

“In any case where the court finds the juvenile to be abused, neglected, or dependent, the jurisdiction of the court to modify any order or disposition made in the case shall continue during the minority of the juvenile, until terminated by order of the court, or until the juvenile is otherwise emancipated.” N.C. Gen. Stat. § 7B-1000(b) (2019). The trial court retains jurisdiction over a juvenile “until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first.” N.C. Gen. Stat. § 7B-201(a) (2019).

DSS filed the First Petition alleging Kaitlyn neglected on 16 November 2007. Approximately one month later, on 11 December 2007, the district court entered an order finding Kaitlyn to be neglected and abused. On 16 September 2009, the trial court entered the Guardianship Order—which was neither appealed nor affected by this Court’s opinion filed 3 July 2018. The Guardianship Order granted the Schindlers legal guardianship of Kaitlyn and secondary legal and physical custody to Kaitlyn’s paternal grandmother. The Guardianship Order stated that DSS is “allowed to cease further reviews in this matter.” The Guardianship Order also released the guardian *ad litem* and attorney advocate “from further reviews in this matter.” Nothing further was filed concerning Kaitlyn until 12 July 2016, when DSS filed the Second Petition alleging neglect and dependency stemming from the Schindlers’ alleged continued substance abuse and involvement in criminal activity.

Notwithstanding subsequent events, which are discussed below, the trial court retained subject matter jurisdiction over this case as a result of the filing of the First Petition on 16 November 2007. The trial court did not terminate jurisdiction by allowing DSS to “cease further reviews” or by releasing the guardian *ad litem* and attorney advocate from “further reviews.” *In re S.T.P.*, 202 N.C. App. 468, 473, 689 S.E.2d 223, 227 (2010) (holding that the district court did not terminate its jurisdiction by using the words “Case closed” in disposition order); N.C. Gen. Stat. § 7B-1000(b). Moreover, the trial court did not lose juvenile jurisdiction when it purported to dismiss the Second Petition on 4 October 2019, following remand by this Court. While this Court reversed (in part) the Adjudication and Disposition Orders, the opinion did not deprive the trial court of jurisdiction to review Kaitlyn’s custody status under the First Petition. Because the district court has not terminated its jurisdiction by order, the trial court retains subject matter jurisdiction until

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Kaitlyn reaches the age of eighteen years or is otherwise emancipated, whichever occurs first. N.C. Gen. Stat. § 7B-201(a).

B. Remand

[2] The Schindlers argue that the trial court failed to comply with this Court’s mandate on remand by holding a permanency planning hearing (on the motion for review filed by DSS in the First Petition case) rather than requiring DSS to demonstrate harm or risk of harm to Kaitlyn by clear and convincing evidence in an adjudicatory hearing related to the Second Petition.

“The general rule is that an inferior court must follow the mandate of an appellate court in a case without variation or departure.” *Metts v. Piver*, 102 N.C. App. 98, 100, 401 S.E.2d 407, 408 (1991) (citing *D&W Inc. v. City of Charlotte*, 268 N.C. 720, 152 S.E.2d 199 (1966)). “On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court.” *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 306 (1962). While the Court has carved out minor exceptions to this general rule, the case law is abundantly clear that the inferior court must rigorously adhere to the mandate of the appellate tribunal on remand.

On 3 July 2018, this Court filed its opinion remanding and reversing in part the Adjudication and Disposition Orders. We concluded that the trial court failed to make sufficient findings showing harm or creation of a substantial risk of harm to adjudicate Kaitlyn neglected. *Matter of M.N.*, 260 N.C. App. at 207-208, 816 S.E.2d at 929. The Court reversed the Adjudication and Disposition Orders because the “trial court failed to make sufficient findings of fact in its adjudication order to support the conclusion that Kaitlyn is a neglected juvenile, [and] because no evidence was introduced to support those necessary findings of fact[.]” *Id.* at 208, 816 S.E.2d. at 929. More specifically, we stated the following:

While the trial court did find that the Schindlers had been arrested on drug-related charges, it failed to make any findings as to harm or risk of harm to Kaitlyn as a result of her guardians’ alleged drug activities. Indeed, neither DSS nor a court-appointed Guardian Ad Litem (“GAL”) introduced any evidence to support findings of harm or risk of harm to Kaitlyn, and the lone witness at the hearing did not testify regarding those factual issues.

Id. at 205, 816 S.E.2d at 927. As such, and consistent with the relief requested by all parties on this issue, this Court reversed the portions of

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the Adjudication and Disposition Orders adjudicating Kaitlyn neglected and remanded the action for further proceedings “not inconsistent with th[e] opinion.” *Id.* at 208, 816 S.E.2d. at 929.⁵

In a surreptitious effort to avoid the mandate of this Court, on 3 July 2018, DSS filed a motion for review under the First Petition. The district court proceeded to hold an initial hearing on the motion on 14 December 2018. Thereafter, the district court entered Juvenile Order I on 4 October 2019. In Juvenile Order I, the district court stated the following: “The language of the Court of Appeals’ opinion does not appear to be readily clear regarding what was reversed and what was remanded back to this trial Court.” The trial court characterized the pertinent issue as follows: “The issue is whether the matter was reversed and closed as to the juvenile [Kaitlyn], or whether it was remanded for further proceedings for finding[s] of fact at adjudication as to the juvenile [Kaitlyn].” The district court ultimately determined that the Court of Appeals “intended to remand the matter for further proceedings on findings of fact.” Notwithstanding this finding, because of the procedural differences between a petition alleging neglect, on one hand, and a motion for review to terminate guardianship, on the other, the district court concluded that DSS’ motion for review was ripe and properly before the court. Indeed, the trial court seemingly encouraged DSS to circumvent the unambiguous mandate of this Court by allowing it to move “forward on the remand that the Court of Appeals has ordered **or** on their motion to review.” DSS, of course, elected the latter option.

Subsequently, the district court held a hearing on 24 April 2019 to address the motion filed by DSS pursuant to N.C. Gen. Stat. §§ 7B-600, 7B-906.1. The district court thereafter entered Juvenile Order II on 4 October 2019, which set out its findings of fact and conclusions of law from this particular hearing. In a nutshell, Juvenile Order II purported to dismiss the Adjudication and Disposition Orders as well as the Second Petition; terminated the Schindlers’ guardianship of Kaitlyn; released the Schindlers as parties; and entered a new permanent plan of guardianship for Kaitlyn.

The trial court erred by disregarding the unequivocal mandate of this Court. We reversed the Adjudication and Disposition Orders because the trial court failed to make sufficient findings of harm or the

5. This Court also held that the Schindlers had standing to appeal the Adjudication and Disposition Orders. *Matter of M.N.*, 260 N.C. App. at 205, 816 S.E.2d at 928. We concluded that “[a]s court-appointed guardians and persons awarded legal custody of Kaitlyn, the Schindlers are parties to this action pursuant to [N.C. Gen. Stat. §] 7B-401.1 and have standing to . . . appeal pursuant to [N.C. Gen. Stat. §] 7B-1002.” *Id.* at 208, 816 S.E.2d at 929.

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creation of a substantial risk of harm. *Matter of M.N.*, 260 N.C. App. at 207-208, 816 S.E.2d at 929. We then remanded the case for further proceedings “not inconsistent with th[e] opinion.” *Id.* at 208, 816 S.E.2d at 929. However, instead of requiring DSS to provide sufficient evidence to adjudicate Kaitlyn neglected (as alleged in the Second Petition) by showing harm or risk of harm, the trial court indicated it was dismissing the Second Petition and permitting DSS to pursue its motion for review filed in the First Petition case. The district court committed reversible error by conducting a permanency planning (or review) hearing terminating the Schindlers’ guardianship of Kaitlyn without first conducting a new adjudicatory hearing on the Second Petition and actually adjudicating Kaitlyn to be neglected as instructed. *Compare* N.C. Gen. Stat. §§ 7B-401, 7B-402 (2019), *with* N.C. Gen. Stat. §§ 7B-600, 7B-906.1 (2019); *In re T.P.*, 254 N.C. App. 286, 292, 803 S.E.2d 1, 6 (2017).

In addition to attempting to circumvent the mandate of this Court, more troubling, Juvenile Order II purported to release (*i.e.*, remove over objection) the Schindlers as parties to the underlying actions. This portion of the order not only violates N.C. Gen. Stat. § 7B-401.1(c) (2019), but also contradicts this Court’s unequivocal holding that the Schindlers were and are proper parties to these proceedings. *Matter of M.N.*, 260 N.C. App. at 208, 816 S.E.2d at 929 (“As court-appointed guardians and persons awarded legal custody of Kaitlyn, the Schindlers are parties to this action . . .”).

In short, by failing to comply with this Court’s mandate, the trial court committed reversible error.

III. Conclusion

For the foregoing reasons, we reverse and vacate the orders entered 4 October 2019 insofar as they pertain to Kaitlyn. This matter is remanded to the district court to comply with the previous mandate of this Court. The court shall make findings of fact under the Second Petition regarding whether the alleged activities of the guardians constituted harm or risk of harm to Kaitlyn. Once those findings have been established, the trial court shall draw the appropriate conclusions of law therefrom with respect to the disposition of the matter. Thereafter, the parties may proceed as permitted under law while taking into consideration this Court’s previous holdings.

REVERSED AND REMANDED.

Judges BRYANT and STROUD concur.

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IN THE MATTER OF FRANK LENNANE, PETITIONER

ADT, LLC, EMPLOYER

AND

NORTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF
EMPLOYMENT SECURITY, RESPONDENT

No. COA20-325

Filed 1 December 2020

**Unemployment Compensation—disqualification from benefits—
voluntary resignation—good cause attributable to employer
analysis**

The determination that petitioner was ineligible for unemployment benefits was affirmed where he failed to show that his good cause for leaving his job—he resigned because pain in his knees made it difficult to do security system installations—was attributable to the employer (as required by N.C.G.S. § 96-14.5(a)). The evidence showed petitioner’s job duties (which included installations) did not change from the time he began his employment until his resignation, the employer tried to limit the number of installation jobs assigned to petitioner and provided technicians to assist him on larger installs, petitioner provided no medical restrictions to the employer and did not make any formal requests for workplace accommodations, and the employer could not provide administrative work because that work was only available out-of-state.

Judge INMAN dissenting.

Appeal by petitioner from order entered 17 February 2020 by Judge W. Robert Bell in Haywood County Superior Court. Heard in the Court of Appeals 21 October 2020.

North Carolina Department of Commerce, by Sharon A. Johnston, for appellee.

Legal Aid of North Carolina, Inc., by Joseph Franklin Chilton, Bettina J. Roberts, John R. Keller, and Celia Pistolis, for petitioner-appellant.

YOUNG, Judge.

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This appeal arises out of a denial of unemployment insurance benefits. The findings of fact support the conclusion of law that Petitioner failed to show that he left work for good cause attributable to the employer. The superior court did not err in denying Petitioner's motion to dismiss. Accordingly, we affirm.

I. Factual and Procedural History

Frank Lennane ("Petitioner") worked as a service technician for ADT, LLC ("Employer") from 1 February 2012 until 16 November 2018. Petitioner's job duties included performing regular service calls, and occasional installations for residential and commercial security systems and alarm systems. On 8 January 2014, Petitioner injured his left knee while on the job. Petitioner had knee surgery and suffered fifteen percent permanent partial injury in his left knee. Following his knee surgery, Petitioner began to favor his right knee, which resulted in new, regular pain in his right knee.

In 2016, Employer went through a business merger and combined its service and installation departments. This change caused Employers to assign more installation work to service technicians. The added installation work was more difficult on Petitioner's knees than his previous job duties, and Petitioner began taking days off work to care for his knees. He sought treatment and was diagnosed with unilateral primary osteoarthritis in his right knee.

Since installations were hard on Petitioner's knees, he asked his manager if he could transfer or apply to other local jobs, such as administrative or clerical work, however, the only positions available would require relocation from North Carolina. Petitioner also requested to be assigned to service calls only, but the manager denied the request because he needed to keep a fair balance of work distribution among all the service technicians. Petitioner's workload was "consistent with the other employees," and the manager distributed work assignments based on Employer's business needs.

By July 2017, the condition of Petitioner's right knee began to worsen. Petitioner utilized the Family and Medical Leave Act ("FMLA") to take a five-week leave of absence to rest his knees and seek additional medical intervention. When Petitioner returned to work, he provided a doctor's note which provided that he would experience flareups and pain, and "a few days rest may be necessary." Petitioner continued to perform all of his duties and responsibilities, but his problems persisted. Petitioner again asked to perform only service calls, and his request was denied.

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Petitioner then notified Employer that he was resigning, because he was no longer able to perform his job due to the poor condition of his knees.

Petitioner applied for unemployment insurance benefits, but an Adjudicator ruled that Petitioner left work without good cause attributable to the employer, and therefore Petitioner was disqualified from receiving benefits. Petitioner appealed the decision to an Appeals Referee which affirmed the Adjudicator's decision. Petitioner appealed to the Board of Review of Respondent North Carolina Department of Commerce, Division of Employment Security ("BOR"), which affirmed the Appeals Referee's decision in a split decision. Petitioner petitioned to the Superior Court, and the court entered an order affirming the BOR's decision in its entirety. Petitioner has now appealed to this Court.

II. Standard of Review

The standard for this Court is to determine whether the findings of fact of the final agency decision are supported by any competent evidence, and then determine whether those findings support the conclusion. N.C. Gen. Stat. § 96-15(i) (2020); *Reeves v. Yellow Transp., Inc.*, 170 N.C. App. 610, 614, 613 S.E.2d 350, 354 (2005).

III. Final Agency Decision

Defendant contends that the superior court erred in affirming the BOR's decision that Petitioner failed to prove that his leaving work was for good cause attributable to the employer. We disagree.

The Division must determine the reason for an individual's separation from work. An individual does not have a right to benefits and is disqualified from receiving benefits if the Division determines that the individual left work for a reason other than good cause attributable to the employer. When an individual leaves work, the burden of showing good cause attributable to the employer rests on the individual and the burden may not be shifted to the employer.

N.C. Gen. Stat. § 96-14.5(a) (2020). "Good cause" and cause "attributable to the employer" are the two elements an employee must prove to be qualified to receive unemployment insurance benefits. "Good cause" has been interpreted by the courts to mean "a reason which would be deemed by reasonable men and women as valid and not indicative of an unwillingness to work." *King v. N.C. Dep't of Commerce*, 228 N.C. App. 61, 65, 743 S.E.2d 83, 86 (2013). The Petitioner's cause for leaving work was the condition of his knees; however, Petitioner fails to show that his cause was attributable to the employer. The cause or reason for leaving

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is attributable to the employer if it was “produced, caused, created or as a result of actions by the employer.” *Id.*

For the entire period that Petitioner worked for Employer he was required to perform at least some installations. The number of installations increased after the 2016 merger; however, Petitioner’s supervisor testified that “he was careful to limit the size of jobs that [Petitioner] went on installation-wise,” and would have another technician work with him, if possible. The supervisor also testified that Petitioner only performed ten installation jobs in the three months prior to his resignation, and only one of those being a full installation. Another technician assisted Petitioner with that full installation. Petitioner has failed to show a change in job duties from the time he began his employment until the time he resigned.

In *Ray v. Broyhill Furniture Indus.*, this Court held that the claimant proved her reason for leaving “was attributable both to the employer’s action (the threat to fire her if she went over her supervisor’s head) and inaction (her supervisor’s failure to put in her transfer request). 81 N.C. App. 586, 593, 344 S.E.2d 798, 802 (1986). However, here, Employer took actions to help Petitioner. Employer provided knee pads for kneeling and crawling, monitored Petitioner’s work schedule and limited the installation jobs, as well as assigned him “lighter re-sales, add-ons, not full-blown installs.” Employer also assigned other technicians to assist in the installations. Employer could not provide administrative work because that work was only available in other states. Petitioner provided no medical restrictions or limitations on bending, stooping, or crawling to Employer. The only medical request Petitioner gave Employer was in September 2017 that he not stand or walk for prolonged periods. Unlike in *Ray*, Employer took action in this case, even if the action was not what Petitioner wanted. As a result, these findings support the conclusion that Petitioner failed to show that he left work for good cause attributable to the employer.

IV. Findings of Fact

The standard for this Court is to determine whether the findings of fact of the final agency decision are supported by any competent evidence, and then determine whether those findings support the conclusion. N.C. Gen. Stat. § 96-15(i); *Reeves v. Yellow Transp., Inc.*, 170 N.C. App. 610, 614, 613 S.E.2d 350, 354 (2005).

a. Finding of Fact No. 12

This finding, that “[t]he employer only had administrative positions in Spartanburg, South Carolina and Knoxville, Tennessee, and the

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claimant was unwilling to relocate from North Carolina,” is supported by Petitioner’s testimony when he said that he knew office jobs existed, but that he didn’t apply for those jobs because of the distance.

b. Findings of Fact No. 16 and No. 17

Finding of Fact No. 16, that “the claimant’s manager made attempts thereafter to not dispatch the claimant on the most strenuous or large installations,” is supported by Petitioner’s supervisor’s unrefuted testimony. The supervisor testified that Petitioner asked him for service work or lighter install jobs. He further testified that while he was not always able to accommodate the request, he “was careful to try to limit the size of the jobs that Petitioner went on installation-wise.” Finding of Fact No. 17, “[i]f the claimant had to be dispatched on a large installation, then manager Goodson would try to ensure that he [claimant] had another service technician available to assist him,” is supported by the supervisor’s testimony that there were times he assigned another technician to help with Petitioner’s installs. Petitioner also confirmed by his own testimony that the supervisor provided help on installs from time-to-time.

c. Finding of Fact No. 18

Finding of Fact No. 18 provides that, “[i]n October 2018, the claimant had an appointment with a surgeon to discuss treatment for his knees. At which time, the claimant was told that he could undergo surgery or stem cell therapy. The claimant was unwilling to undergo either option. This finding is supported by Petitioner’s testimony of the types of treatments recommended for his knee, and that he “didn’t even [want to] go down that avenue.”

d. Finding of Fact No. 21

Finding of Fact No. 21 provides that “[p]rior to the claimant’s resignation, he did not make any formal or written requests for workplace accommodations from either the employer’s administrative or human resource staff members. During 2018, the claimant did not request intermittent leave via FMLA.” This finding is supported by Petitioner’s testimony that he did not consider any type of FMLA or other short-term disability. Petitioner did not provide Employer a letter from his doctor or surgeon requesting restrictions or limitations on his job. Petitioner relied on FMLA Certification by his doctor which only stated, “[p]rolonged standing and walking would be very difficult for this patient.”

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e. Finding of Fact No. 22

This finding, that “[t]he claimant left his job due to personal health or medical reasons,” is supported by Petitioner’s testimony that his knee problems caused him to resign.

Each of the above findings are supported by competent evidence of record. Additionally, each finding supports the conclusion that the Petitioner failed to establish that his good cause for leaving work was “attributable to the employer” as required by N.C. Gen. Stat. § 96-15(i). Accordingly, the superior court did not err in denying Petitioner’s motion to dismiss, nor did the court err in finding that Petitioner was not entitled to unemployment insurance benefits. Therefore, we affirm the lower court’s decision.

AFFIRMED.

Judge DILLON concurs.

Judge INMAN dissents.

INMAN, Judge, dissenting.

Because in my view precedent compels us to hold that Petitioner left work for good cause attributable to the employer, I respectfully dissent from the majority’s holding to the contrary.

The Employment Security Act requires “the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed *through no fault of their own*.” N.C. Gen. Stat. § 96-2 (2019) (emphasis added). We are bound by this Court’s previous holding that “[t]he Act is to be liberally construed in favor of applicants,” *Marlow v. N.C. Emp’t Sec. Com’n*, 127 N.C. App. 734, 735, 493 S.E.2d 302, 303 (1997) (citation omitted), and that “statutory provisions allowing disqualification from benefits must be strictly construed in favor of granting claims.” *Id.* (citations omitted).

In *Ray v. Broghill Furniture Indus.*, 81 N.C. App. 586, 344 S.E.2d 798 (1986), this Court held that an employee who left a job as a result of the employer’s actions or inaction abandoned the employment due to “good cause attributable to her employer” and could not be denied unemployment benefits provided by the Act. *Ray*, 81 N.C. App. at 592, 344 S.E.2d at 802. We explained in *Ray* that “[t]he Act does not contemplate penalizing workers who choose in favor of their own health, safety or ethical

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standards and against an affirmative or *de facto* policy of the employer to the contrary.” *Id.* at 593, 344 S.E.2d at 802-03 (citation omitted).

Petitioner’s deteriorating knee prevented him from performing the number of installations required of him by his employer. Respondent concedes he had good cause to resign. But, rather than giving up immediately, Petitioner sought to adapt his work to accommodate his injury by requesting he be assigned to a desk job. His employer declined that request unless he was willing to relocate to another state.

Petitioner then requested that he be assigned only to less strenuous service calls. That request was denied not because such work was unavailable, but because his employer’s “business needs” required Petitioner to continue performing installations that his body could not support. Although the Petitioner’s manager, per the findings of fact made below, “made *attempts* . . . to not dispatch the claimant on the most strenuous or large installations[,]” and “would *try* to ensure that [Petitioner] had another service technician available to assist him[,]” (emphasis added), the manager testified that their employer nonetheless required Petitioner to continue performing installations “consistent with the other employees” and to the detriment of his health. And while the evidence—but not any factual findings—shows that Petitioner’s employer provided him with kneepads, that same evidence discloses that the kneepads were ineffective in preventing Petitioner’s pain and were not a specific accommodation provided for purposes of addressing his osteoarthritis. “The Act does not contemplate penalizing workers who choose in favor of their own health, safety or ethical standards and against an affirmative or *de facto* policy of the employer to the contrary.” *Ray*, 81 N.C. App. at 593, 344 S.E.2d at 802-03 (citation omitted).

It is not Petitioner’s fault that his knee suffers from osteoarthritis, nor is it his fault that his employer’s “business needs” precluded accommodations that would not require him to sacrifice his health. He was thus rendered “unemployed through no fault of [his] own[,]” N.C. Gen. Stat. § 96-2. As in *Ray*, Petitioner’s employer’s “inaction placed [him] in the untenable position of having to choose between leaving [his] job and becoming unemployed or remaining in a job which . . . exacerbated [his medical] conditions.” 81 N.C. App. at 592-93, 344 S.E.2d at 802. Consistent with that precedent, I would hold that Petitioner left work for “good cause attributable to the employer” within the meaning of N.C. Gen. Stat. § 96-14.5(a) (2019) and should not be disqualified from receiving unemployment benefits. I respectfully dissent.

IN RE R.D.B.

[274 N.C. App. 374 (2020)]

IN THE MATTER OF R.D.B., A MINOR CHILD

No. COA19-1019

Filed 1 December 2020

**Guardian and Ward—Chapter 35A guardianship proceeding—
Rules of Evidence—applicability—admission or exclusion of
evidence—prejudice**

In a guardianship case filed by a minor child’s grandparents, where the superior court upheld the assistant clerk of court’s appointment of the child’s stepfather as the child’s legal guardian, the court erred in concluding that the North Carolina Rules of Evidence did not apply to Chapter 35A minor guardianship proceedings. However, neither this error nor any resultant admission or exclusion of evidence amounted to prejudicial error because, even setting aside any findings of fact that relied upon evidence the grandparents challenged on appeal, the unchallenged findings of fact by both the assistant clerk and the superior court supported the guardianship appointment.

Appeal by petitioners from order entered 9 April 2019 by Judge Carla Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 August 2020.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, and Jon R. Burns, for petitioners-appellants Ruby and Caleb Harkness.

Kip David Nelson for appellee Raymond Mann.

ZACHARY, Judge.

Petitioners Ruby and Caleb Harkness appeal from the superior court’s order affirming the assistant clerk of court’s order appointing Raymond Mann to serve as the guardian of the minor child, R.D.B. (“Robert”).¹ After careful review, we affirm.

Background

Robert was born in September 2010. Robert’s father died intestate on 4 August 2013. From 2011 to 2014, Robert and his mother, Tracee,

1. We employ a pseudonym to protect the identity of the juvenile.

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lived with the Harknesses, Tracee's parents, in Georgia; in 2014, they moved in with Raymond Mann, Tracee's boyfriend, in Charlotte, North Carolina. About a year later, Tracee and Raymond were married. On 1 October 2017, Tracee died intestate, leaving Robert with no living biological parents, and thus no natural guardian. Robert continued to reside in Charlotte with Raymond after Tracee's passing.

On 31 October 2017, the Harknesses filed a guardianship application with the Mecklenburg County Clerk of Superior Court, seeking appointment as general guardians of Robert. The Harknesses named Raymond as a person "known to have an interest in this proceeding," and on 8 November 2017, a Mecklenburg County Sheriff's deputy served Raymond with a copy of the Harknesses' application and a notice of hearing. On 22 November 2017, the assistant clerk² entered an order appointing a guardian *ad litem* for Robert.

In June 2018, over the course of six days, the guardianship case was tried before the assistant clerk. On 11 July 2018, the assistant clerk entered an order appointing Raymond to serve as Robert's guardian. The Harknesses gave timely notice of appeal to the Mecklenburg County Superior Court, pursuant to N.C. Gen. Stat. § 1-301.3(c).

On 15 January 2019, the Harknesses' appeal came on for hearing before the Honorable Carla Archie in Mecklenburg County Superior Court. The Harknesses argued that the assistant clerk erred by (1) failing to "consider any statements that were purportedly made by the minor child to anyone other than a guardian ad litem, or to a therapist, regarding what his preferences were in this case," particularly "anything that the child said to any grandparents, any aunts, [or any] uncles"; (2) "allow[ing] virtually most all statements made or purported to be made to witnesses in this case by Tracee Mann, the deceased mother"; and (3) admitting the testimony of Che'Landra Moore-Quarles, a licensed professional counselor, as an "expert in grief counseling."

On 9 April 2019, the superior court entered an order affirming the assistant clerk's appointment of Raymond as guardian. The superior court concluded, *inter alia*, that the minor guardianship hearing was held before the assistant clerk in accordance with section 35A-1223 of our General Statutes, "to which the North Carolina Rules of Evidence do not apply." In addition, the superior court concluded that "[t]here was no prejudicial error in the admission or exclusion of evidence" at

2. "An assistant clerk is authorized to perform all the duties and functions of the office of clerk of superior court, and any act of an assistant clerk is entitled to the same faith and credit as that of the clerk." N.C. Gen. Stat. § 7A-102(b) (2019).

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the hearing. The Harknesses timely noticed their appeal of the superior court's order.

Discussion

The Harknesses raise two arguments on appeal to this Court. They contend that (1) “[t]he superior court reversibly erred in concluding that the North Carolina Rules of Evidence do not apply to this Guardianship Action”; and (2) “[t]he superior court reversibly erred in concluding that the clerk did not commit prejudicial error in admitting and/or excluding evidence at trial[.]”

I. Standard of Review

This Court has held that section 1-301.3 of our General Statutes governs the standard of review for an appeal arising from an order appointing a guardian. *In re Winstead*, 189 N.C. App. 145, 151, 657 S.E.2d 411, 415 (2008). Pursuant to this statute, the clerk “shall determine all issues of fact and law,” and “shall enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment.” N.C. Gen. Stat. § 1-301.3(b).

“When a party appeals a judgment or order entered by the clerk of court to the superior court, the trial court sits as an appellate court.” *In re Taylor*, 242 N.C. App. 30, 34, 774 S.E.2d 863, 866 (2015) (citation and internal quotation marks omitted). Under section 1-301.3, when sitting as an appellate court,

the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:

- (1) Whether the findings of fact are supported by the evidence.
- (2) Whether the conclusions of law are supported by the findings of facts.
- (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

N.C. Gen. Stat. § 1-301.3(d). “If the judge finds prejudicial error in the admission or exclusion of evidence, the judge, in the judge’s discretion, shall either remand the matter to the clerk for a subsequent hearing or resolve the matter on the basis of the record.” *Id.*

“The standard of review in this Court is the same as in the Superior Court.” *In re Estate of Johnson*, 264 N.C. App. 27, 32, 824 S.E.2d 857, 861 (2019) (citation omitted). The superior court’s review is limited to “those findings of fact which the appellant has properly challenged by

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specific exceptions.” *In re Estate of Whitaker*, 179 N.C. App. 375, 382, 633 S.E.2d 849, 854 (2006) (emphasis omitted) (citation and internal quotation marks omitted). “Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal.” *In re Estate of Harper*, ___ N.C. App. ___, ___, 837 S.E.2d 602, 604 (2020) (citation and internal quotation marks omitted).

II. The Rules of Evidence

The Harknesses first challenge the superior court’s conclusion of law that “the North Carolina Rules of Evidence do not apply” to minor guardianship hearings governed by section 35A-1223.

Chapter 35A of our General Statutes provides that “[a]ny person or corporation, including any State or local human services agency[,]” may apply “for the appointment of a guardian of the person or general guardian for any minor who [does not have a] natural guardian.” N.C. Gen. Stat. § 35A-1221. The clerk of superior court will then conduct a hearing “to determine whether the appointment of a guardian is required, and, if so, consider[] the child’s best interest in determining who the guardian(s) should be.” *Corbett v. Lynch*, 251 N.C. App. 40, 42, 795 S.E.2d 564, 565 (2016) (citing N.C. Gen. Stat. § 35A-1223). At the guardianship hearing, the clerk may receive a broad array of evidence:

If the court determines that a guardian or guardians are required, the court shall receive evidence necessary to determine the minor’s assets, liabilities, and needs, and who the guardian or guardians shall be. The hearing may be informal and the clerk may consider whatever testimony, written reports, affidavits, documents, or other evidence the clerk finds necessary to determine the minor’s best interest.

N.C. Gen. Stat. § 35A-1223.

The Harknesses argue that “[a] plain reading” of section 35A-1223, as well as “the superior court’s standard of review for the appeal from an order awarding guardianship of a minor,” make clear that the Rules of Evidence apply to such hearings. We agree—albeit for different reasons.

It is axiomatic that “[t]he primary goal of statutory construction is to arrive at legislative intent.” *Alberti v. Manufactured Homes, Inc.*, 329 N.C. 727, 732, 407 S.E.2d 819, 822 (1991). In the case at bar, the legislative intent is manifest.

Our Rules of Evidence “govern proceedings in the courts of this State to the extent and with the exceptions stated in Rule 1101.” N.C.

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Gen. Stat. § 8C-1, Rule 101. Rule 1101 states that “[e]xcept as otherwise provided in subdivision (b) or by statute,” the Rules of Evidence “apply to all actions and proceedings in the courts of this State.” *Id.* § 8C-1, Rule 1101(a).

Subdivision (b) provides that the Rules of Evidence, other than those respecting privileges, are inapplicable in certain listed situations:

- (1) **Preliminary Questions of Fact.** -- The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).
- (2) **Grand Jury.** -- Proceedings before grand juries.
- (3) **Miscellaneous Proceedings.** -- Proceedings for extradition or rendition; first appearance before district court judge or probable cause hearing in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise.
- (4) **Contempt Proceedings.** -- Contempt proceedings in which the court is authorized by law to act summarily.

Id. § 8C-1, Rule 1101(b). Minor guardianship proceedings pursuant to section 35A-1223 are not included in Rule 1101(b)’s enumerated exceptions.

In addition, the General Assembly did not “otherwise provide[] . . . by statute,” *id.* § 8C-1, Rule 1101(a), that the Rules of Evidence would not apply to minor guardianship proceedings pursuant to section 35A-1223. In particular, there is no mention of the Rules of Evidence in Chapter 35A of our General Statutes, “Incompetency and Guardianship.”

Moreover, our statutes contain numerous examples of instances in which our General Assembly has specifically excepted certain proceedings from the Rules of Evidence, which it failed to do with regard to minor guardianship hearings. *See, e.g., id.* § 7B-901(a) (initial dispositional hearings in juvenile actions under Chapter 7B); *id.* § 20-9(g)(4)(d) (hearings to review the restriction, cancellation, or denial of a driver’s license, due to a person’s physical or mental disability or disease); *id.* § 115C-325(j)(4) (hearings upon a superintendent’s recommendation for the dismissal or demotion of a public-school teacher who is a “career employee,” as defined by N.C. Gen. Stat. § 115C-325(a)(1a)).

In that the legislature did not except Chapter 35A minor guardianship proceedings from the application of the Rules of Evidence in Rule

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1101(b) or by other statute, we conclude that the legislature intended for the Rules of Evidence to apply to minor guardianship proceedings. Accordingly, the Rules of Evidence apply to minor guardianship proceedings under section 35A-1223, and the trial court erred by concluding otherwise. *Cf. State v. Foster*, 222 N.C. App. 199, 203, 729 S.E.2d 116, 119 (2012) (holding that, because “motions for post-conviction DNA testing are not listed as an exception while the Rules of Evidence specifically list other exceptions, the Rules of Evidence apply to [such] motions or proceedings”).

Nevertheless, for this to constitute reversible error, it must have been prejudicial to the Harknesses. *See* N.C. Gen. Stat. § 1-301.3(d); *see also In re Estate of Tucci*, 104 N.C. App. 142, 151, 408 S.E.2d 859, 865 (1991) (“A party asserting error on appeal must show from the record that the trial court committed error, and that he was prejudiced as a result.”), *disc. review improvidently allowed*, 331 N.C. 749, 417 S.E.2d 236 (1992).

III. Prejudice

The Harknesses assert that “the superior court wrongly found no prejudicial error” in the assistant clerk’s evidentiary rulings (1) excluding testimony of Robert’s statements to others; (2) admitting testimony of Tracee’s statements to others; and (3) admitting the expert testimony of Che’Landra Moore-Quarles, a licensed counselor who treats “a variety of mental health issues including depression, grief, trauma and substance abuse.” In so arguing, the Harknesses challenge (1) the superior court’s findings of fact 9 and 10 (upholding the assistant clerk’s findings of fact 13 and 26, respectively); (2) the superior court’s finding of fact 13 (upholding the assistant clerk’s finding of fact 34);³ and (3) the superior court’s findings of fact 19 and 20 (upholding the assistant clerk’s acceptance of Moore-Quarles as an expert witness, and the assistant clerk’s finding of fact 27).

As previously stated, our review is limited to “those findings of fact *which the appellant has properly challenged by specific exceptions.*” *Estate of Whitaker*, 179 N.C. App. at 382, 633 S.E.2d at 854 (citation and internal quotation marks omitted). The remaining “[u]nchallenged findings of fact are presumed to be supported by competent evidence

3. The Harknesses argue that the assistant clerk’s finding of fact 36 is also “expressly based at least in part on this error,” but they fail to challenge on appeal the superior court’s finding of fact 17, which upheld, *inter alia*, the assistant clerk’s finding of fact 36. Nevertheless, as illustrated below, excluding the assistant clerk’s finding of fact 36 does not change our analysis.

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and are binding on appeal.” *Estate of Harper*, ___ N.C. App. at ___, 837 S.E.2d at 604 (citation and internal quotation marks omitted).

The assistant clerk’s order contains 39 findings of fact. On appeal to the superior court, the Harknesses initially challenged 14 of those findings of fact, before withdrawing four of these challenges by the time of the superior court hearing. The superior court thus considered, and upheld in its order, ten of the assistant clerk’s findings of fact. Before this Court, the Harknesses specifically challenge only five of the superior court’s findings of fact—four of which uphold the assistant clerk’s findings of fact, and one which upholds her acceptance of Moore-Quarles as an expert witness.

Of the findings of fact in the assistant clerk’s order that the Harknesses never specifically challenged or that the superior court upheld in findings of fact that the Harknesses do not specifically challenge on appeal, we note the following:

18. The minor child is a member of a large, extended family inclusive of [Raymond], the Harknesses, his maternal sibling and relatives, his paternal siblings and relatives . . . , [Raymond]’s relatives, and close friends of [Raymond and Tracee].

. . . .

24. [Robert] lived with his mother and [Raymond] in [Raymond]’s home in Charlotte, North Carolina from 2014 until [Tracee]’s death.

25. [Raymond] has played a significant role in [Robert]’s life since [Robert and Tracee] moved to Charlotte. [Raymond] assisted [Tracee] in providing care, support and supervision of [Robert].

. . . .

28. [Raymond] is gainfully employed and provides for [Robert]’s basic needs and extracurricular activities.

29. [Raymond] is knowledgeable about [Robert]’s medical history and takes [him] to wellness appointments. [Raymond] also maintains medical and dental insurance for [Robert].

30. [Raymond] is knowledgeable about [Robert]’s educational needs and progress. [Raymond] previously enrolled

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[Robert] in school tutoring and [Raymond] has assisted [Robert] with his homework and special school projects.

31. [Raymond] opened a 529 Education account for [Robert] and . . . makes monthly contributions to that account.

32. [Raymond] demonstrates an active interest in [Robert]’s interests, activities and friendships. [Raymond] has coached [Robert]’s basketball team for three years.

33. [Raymond] has demonstrated respect and support of [Robert]’s relationship with his siblings and relatives. [Raymond] and [Robert] participated in a Balloon Release to honor the memory of [Robert’s] late [father]. [Raymond] allowed [Robert] to attend a summer family event with [his late father’s] family.

. . . .

35. [Petitioner Ruby] . . . expressed appreciation for the role Raymond . . . played in her daughter’s and grandchildren’s lives.

The assistant clerk also made three unchallenged findings regarding Robert’s best interest with respect to the appointment of a guardian:

37. The best interest of [Robert] would be best promoted by the appointment of a guardian of person who will support [his] ongoing development and physical, emotional, and social wellbeing.

38. The best interest of [Robert] would be best promoted by the appointment of a guardian of person who will ensure that [he] has appropriate contact with members of [his] diverse and extended family, inclusive of the Harknesses, [Robert’s father’s] family, [Raymond], [Raymond]’s relatives, and close friends of [Raymond and Tracee].

39. The best interest of [Robert] would not be promoted by appointing multiple guardians of the person, a guardian of estate, or a general guardian.

Our review of the voluminous record evinces substantial support for the assistant clerk’s decision to appoint Raymond to serve as Robert’s guardian, as well as the superior court’s order affirming Raymond’s appointment. Moreover, assuming, *arguendo*, that the superior court

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erred by making the challenged findings of fact that upheld the assistant clerk's challenged findings of fact, the Harknesses have not shown that they were prejudiced by these errors. Even if we were to exclude the evidence that the Harknesses challenge on appeal, together with the challenged findings of fact supported by that evidence, the remaining unchallenged findings of fact amply support the remaining conclusions of law, which ultimately support the assistant clerk's appointment of Raymond as Robert's guardian and the superior court's affirmance of that appointment.

As regards the acceptance of Moore-Quarles as an expert witness, assuming, *arguendo*, that the trial court erred, the Harknesses' argument lacks merit insofar as they have not shown prejudice.

The Harknesses assert that the admission of Moore-Quarles' testimony, "including her purported expert opinions about how the minor child sees his life and whether his current environment should change," amounted to prejudicial error. However, Moore-Quarles was not mentioned with any detail in the assistant clerk's order. The superior court stated in its finding of fact 20—which the Harknesses challenge on appeal—that the assistant clerk "gave little weight to Ms. Moore-Quarles' testimony, as the only [finding of fact] regarding her involvement was that the minor child attended grief sessions." In that sole finding of fact, the assistant clerk stated that Raymond enrolled Robert in grief therapy sessions and that both parties "had opportunities to speak with the therapist about [Robert's] progress." Moreover, there is no description of that progress in the assistant clerk's order, nor is there any mention of Moore-Quarles' opinions. It is evident that the assistant clerk relied very little, if at all, on Moore-Quarles' testimony in making her decision. Thus, the Harknesses can show no prejudice from the admission of Moore-Quarles' testimony. *See Woncik v. Woncik*, 82 N.C. App. 244, 249, 346 S.E.2d 277, 280 (1986) ("[W]e fail to see the prejudice to plaintiff . . . , especially since the trial judge made no reference to [the expert's] testimony in his order; thus, we may presume that the testimony played no role in his decision.").

Although the assistant clerk made other findings of fact that could have supported the appointment of the Harknesses to serve as Robert's guardians, the unchallenged findings of fact more than sufficiently support the assistant clerk's order appointing Raymond to serve as Robert's guardian. Despite the superior court's erroneous conclusion of law regarding the applicability of the Rules of Evidence, the Harknesses have not shown that they were prejudiced by that error, or by any resultant erroneous admission or exclusion of evidence.

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Conclusion

The superior court improperly concluded that the Rules of Evidence do not apply to minor guardianship hearings governed by section 35A-1223. However, for the foregoing reasons, any alleged errors arising from the assistant clerk's evidentiary rulings did not prejudice the Harknesses. Accordingly, we affirm the superior court's order affirming the appointment of Raymond Mann as Robert's guardian.

AFFIRMED.

Chief Judge McGEE and Judge HAMPSON concur.

PETER MILLAR, LLC, PLAINTIFF-APPELLANT

v.

SHAW'S MENSWEAR, INC., d/b/a THE SHAW GROUP RETAIL CONSULTANTS, THIRD-PARTY PLAINTIFF-DEFENDANT-APPELLEE

v.

JC NAPLES, INC., G.C. OF WINTER PARK, INC., JCWP, LLC, AND HOWARD CRAIG DELONGY, THIRD-PARTY DEFENDANTS-APPELLANTS

No. COA19-1078

Filed 1 December 2020

1. Appeal and Error—interlocutory order—N.C.G.S. § 1-75.12 motion to stay granted—right of immediate appeal

In a contract action in which a related suit was already pending in a Georgia court, the trial court's order granting defendant's motion to stay, in accordance with N.C.G.S. § 1-75.12(a), was immediately appealable pursuant to section 1-75.12(c).

2. Appeal and Error—interlocutory order—motion to dismiss third-party complaint for lack of jurisdiction and improper venue—right of immediate appeal

In a contract action in which a related suit was already pending in a Georgia court, the trial court's order denying a third-party defendant's motion to dismiss for lack of personal jurisdiction and improper venue was immediately appealable as affecting a substantial right.

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3. Appeal and Error—interlocutory order—order granting attorney fees—not immediately appealable

In a contract action in which a related suit was already pending in a Georgia court, although immediate appellate review was available to review the trial court's order granting defendant's motion to stay and denying the third-party defendant's motion to dismiss (which alleged a lack of personal jurisdiction and improper venue), a challenge to the court's order granting attorney fees was dismissed because that order did not affect a substantial right.

4. Jurisdiction—contract dispute—related suit pending in another state—motion to stay granted—abuse of discretion analysis

In a contract action initiated by a North Carolina clothing manufacturer to collect a past due account from a Georgia clothing wholesaler, the trial court did not abuse its discretion by granting the wholesaler's motion to stay where the wholesaler had a pending related suit in Georgia (for breach of consignment agreements) against a Florida clothing retailer that held inventory made by the North Carolina manufacturer. Sufficient evidence was presented to support the court's determination that a substantial injustice would result if the North Carolina suit were permitted to go forward (pursuant to N.C.G.S. § 1-75.12(a)), due to the risk that inconsistent judgments might result from simultaneous proceedings in two different states regarding the same contractual issue.

5. Venue—forum selection clause—stipulation to clause being mandatory—enforceability—remand for entry of order dismissing action

In a contract action initiated by a North Carolina manufacturer against a Georgia wholesaler to collect on a past due account, where the wholesaler filed a third-party complaint against a Florida retailer that held the manufacturer's inventory, and where the wholesaler and retailer stipulated that their consignment agreement's forum selection clause was mandatory (listing Georgia as the proper forum for disputes), the Court of Appeals applied Georgia law and concluded that the clause was valid and enforceable. The wholesaler presented no evidence that litigating the matter in Georgia would be inconvenient—not only had the wholesaler drafted the forum selection clause but also it had availed itself of the clause by initiating a suit against the retailer in Georgia. The matter was remanded with instruction for the trial court to enter an order dismissing the third-party complaint for improper venue.

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6. Jurisdiction—personal—long-arm statute—commercial transactions—lack of direct contact between nonresident retailer and North Carolina manufacturer

In a contract action initiated by a North Carolina manufacturer against a Georgia wholesaler to collect on a past due account, in which the wholesaler filed a third-party complaint against a Florida retailer that held the manufacturer's inventory, the wholesaler (as third-party plaintiff) failed to demonstrate the Florida retailer had sufficient direct contacts with the North Carolina manufacturer to be subjected to jurisdiction under this State's long-arm statute (N.C.G.S. § 1-75.4(5)(d)). The evidence showed that none of the manufacturer's shipments to the retailer were at the retailer's order or direction, but were instead directed by the wholesaler, and all orders and directions regarding the inventory occurred in either Florida or Georgia. The matter was remanded with instruction for the trial court to enter an order dismissing the third-party complaint for lack of personal jurisdiction.

Judge ARROWOOD concurring in part and dissenting in part.

Appeal by plaintiff-appellant and third-party defendants-appellants from order entered 6 August 2019 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 12 August 2020.

Williams Mullen, by Camden R. Webb and Lauren E. Fussell, for plaintiff-appellant.

Manning Fulton & Skinner P.A., by William S. Cherry, III and Jessica B. Vickers, for defendant-appellee.

Graebe Hanna & Sullivan, PLLC, by Christopher T. Graebe and J. William Graebe, for third-party defendants-appellants.

BERGER, Judge.

On August 6, 2019, the trial court entered an order denying Appellants JC Naples, Inc.; G.C. of Winter Park, Inc.; JCWP, LLC; and Howard Craig Delongy's (collectively, "Delongy Stores") motions to dismiss and granting Appellee Shaw's Menswear, Inc.'s ("Shaw") motion to stay. Appellant Peter Millar, LLC ("Millar") argues the trial court erred when it granted the motion to stay. Delongy Stores argues the trial court erred when it

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(1) denied the motions to dismiss the third-party complaint for improper venue and for lack of personal jurisdiction, and (2) did not award attorneys' fees pursuant to the contract between the parties. For the reasons stated herein, we affirm the trial court's order granting the motion to stay and denying attorneys' fees. We remand with instructions to enter an order dismissing the third-party complaint for improper venue and lack of personal jurisdiction.

Factual and Procedural Background

Delongy Stores and Shaw are parties to various consignment agreements (the "Consignment Agreements"). Shaw, a men's clothing wholesaler in Georgia, agreed to purchase inventory from manufacturing suppliers for Delongy Stores, a group of men's clothing retailers in Florida. Pursuant to the Consignment Agreements, Delongy Stores "select[s] the inventory to be consigned" to them by submitting orders to the manufacturing suppliers using forms provided by Shaw. Shaw is "responsible for approving the amount of inventory requested by and to be consigned" to Delongy Stores. Then, Shaw will "deliver or cause to be delivered" the selected inventory to Delongy Stores. Shaw retains ownership of the inventory while it is in the possession of Delongy Stores. As Delongy Stores sells its consigned inventory, the sale proceeds are deposited in an account owned by Shaw. Shaw uses the proceeds to reimburse the manufacturing suppliers, take a commission, and pay the balance to Delongy Stores.

Millar, a North Carolina men's clothing manufacturer, provides inventory to Shaw, some of which was consigned in Delongy Stores. According to Millar's verified complaint, "[a]s part of Shaw's services, . . . on behalf of Delongy Stores," Shaw was required to "pay[] [Millar] for merchandise that [was] shipped to [Delongy Stores]." As of February 6, 2019, Shaw owed Millar \$448,050.66 for inventory shipped to Delongy Stores.

On February 8, 2019, Shaw filed suit against Delongy Stores in Georgia Superior Court for default and breach of the Consignment Agreements. Shaw did not name Millar as a party in the Georgia action. Delongy Stores removed the Georgia action to the United States District Court for the Middle District of Georgia. However, that court remanded the action back to Georgia Superior Court because the forum selection clause in the Consignment Agreements "requires the suit to take place in [the proper Georgia Superior court.]"

On February 6, 2019, Millar filed suit against Shaw in Durham County (North Carolina) Superior Court for the past due account. Shaw filed an answer, and also filed a third-party complaint against Delongy Stores.

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Delongy Stores subsequently filed a motion to dismiss the third-party complaint for improper venue and for lack of personal jurisdiction. Shaw filed a motion to stay the North Carolina action.

On August 6, 2019, the trial court entered an order denying Delongy Stores' motions to dismiss and granting Shaw's motion to stay. Millar argues the trial court erred when it granted Shaw's motion to stay. Delongy Stores argues the trial court erred when it (1) denied the motions to dismiss the third-party complaint for improper venue and for lack of personal jurisdiction, and (2) did not award attorneys' fees pursuant to the Consignment Agreements. We address each issue below.

Analysis

I. Interlocutory Appeals

[1] “As a general rule, there is no right of appeal from an interlocutory order.” *Edwards v. Foley*, 253 N.C. App. 410, 411, 800 S.E.2d 755, 756 (2017).

However, when “a motion for a stay . . . is granted, any nonmoving party shall have the right of immediate appeal.” N.C. Gen. Stat. § 1-75.12(c) (2019). Thus, Millar's appeal is properly before this Court.

[2] In addition, Delongy Stores' appeal of its motion to dismiss the third-party complaint for lack of personal jurisdiction is properly before this Court. “Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant[.]” N.C. Gen. Stat. § 1-277(b) (2019).

Further, Delongy Stores' appeal of its motion to dismiss the third-party complaint for improper venue is properly before us. This Court has previously stated, “an appeal from a motion to dismiss for improper venue based upon a jurisdiction or venue selection clause dispute deprives the appellant of a substantial right that would be lost.” *Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 566, 566 S.E.2d 160, 161 n.1 (2002). *See Hill v. StubHub, Inc.*, 219 N.C. App. 227, 232, 727 S.E.2d 550, 554 (2012) (“immediate appellate review of an interlocutory order is available . . . when the interlocutory order affects a substantial right under N.C. Gen. Stat. § 1-277(a)[.]”).

[3] However, an “order granting attorney's fees is interlocutory as it does not finally determine the action nor affect a substantial right which might be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order.” *Benfield v. Benfield*, 89 N.C. App. 415, 419, 366 S.E.2d 500, 503 (1988) (citation and quotation marks omitted). Here, the trial court's decision to not award attorneys' fees

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is interlocutory and is “best left until the underlying action has been resolved[.]” *Andaloro v. Sawyer*, 144 N.C. App. 611, 614, 551 S.E.2d 128, 131 (2001). Therefore, we dismiss this issue as interlocutory.

II. Motion to Stay

[4] “We review a trial court’s grant of a motion to stay for an abuse of discretion.” *Bryant & Assocs., LLC v. ARC Fin. Servs., LLC*, 238 N.C. App. 1, 4, 767 S.E.2d 87, 90 (2014) (citation omitted). This Court

[does] not re-weigh the evidence before the trial court or endeavor to make our own determination of whether a stay should have been granted. Instead, mindful not to substitute our judgment in place of the trial court’s, we consider only whether the trial court’s [grant] was a patently arbitrary decision, manifestly unsupported by reason.

Id. at 4, 767 S.E.2d at 90 (citation omitted). “[A]ppellate review is limited to insuring that the decision could, in light of the factual context in which it was made, be the product of reason.” *Home Indem. Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 113, 118, 493 S.E.2d 806, 809 (1997) (citation omitted).

If, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State.

N.C. Gen. Stat. § 1-75.12(a) (2019). Traditionally, our Courts have considered the following factors to determine whether a substantial injustice would result if the trial court denied the stay:

(1) the nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by plaintiff, and (10) all other practical considerations.

Lawyers Mut. Liab. Ins. Co. v. Nexsen, Pruet, Jacobs & Pollard, 112 N.C. App. 353, 356, 435 S.E.2d 571, 573 (1993) (citation omitted).

“A court will not have abused its discretion in failing to consider each enumerated factor.” *Id.* at 357, 435 S.E.2d at 574.

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Further, in determining whether to grant a stay, it is not necessary that the trial court find that all factors positively support a stay, as long as it is able to conclude that (1) a substantial injustice would result if the trial court denied the stay, (2) the stay is warranted by those factors present, and (3) the alternative forum is convenient, reasonable, and fair.

Wachovia Bank v. Harbinger Capital Partners Master Fund I, Ltd., 201 N.C. App. 507, 520, 687 S.E.2d 487, 495 (2009) (citation omitted).

Millar argues that the trial court did not make a finding of fact that Shaw would suffer a substantial injustice if the trial court denied the stay. However, the trial court is not required to make written findings of fact and conclusions of law, rather, these are necessary on motions only when requested by a party. *See* N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2019). Here, Millar made no specific request for findings of fact or conclusions of law, therefore, the trial court was not required to find facts. *See Allen v. Trust Co.*, 35 N.C. App. 267, 269, 241 S.E.2d 123, 125 (1978) (holding that “absent a request for findings of fact to support his decision on a motion, the judge is not required to find facts . . . and it is presumed that the [j]udge, upon proper evidence, found facts to support this judgment.” (citation omitted)).

Here, there was sufficient evidence to support the trial court’s order granting the motion to stay because the potential for inconsistent judgments from simultaneous proceedings in two different states addressing the same issue could result in a substantial injustice. *See Wachovia Bank*, 201 N.C. App. at 520-21, 687 S.E.2d at 495-96. In the Georgia action, Shaw alleges that Delongy Stores breached the Consignment Agreements in several respects, some of which may directly impact this action. In addition, “the stay is warranted by [the *Lawyers Mutual*] factors[,]” including: the nature of the case, the convenience of the witnesses, the availability of compulsory process to produce witnesses, and the relative ease of access to sources of proof. *Id.* at 521, 687 S.E.2d at 496.

Accordingly, the trial court did not totally abandon consideration of the *Lawyers Mutual* factors and was able to conclude that a substantial injustice would result if it denied the stay. *See Wachovia Bank*, 201 N.C. App. at 521, 687 S.E.2d at 496. Because the trial court did not make “a patently arbitrary decision, manifestly unsupported by reason,” the trial court did not abuse its discretion when it granted the motion to stay. *Bryant & Assocs., LLC*, 238 N.C. App. at 4, 767 S.E.2d at 90 (citation omitted). Accordingly, we affirm the trial court’s order granting the motion to stay.

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III. Motions to Dismiss

Delongy Stores argues that the trial court erred when it denied the motions to dismiss the third-party complaint for improper venue and for lack of personal jurisdiction. We agree.

A. Improper Venue

[5] “A trial court’s interpretation of a forum selection clause is an issue of law that is reviewed *de novo*.” *US Chem. Storage, LLC v. Berto Constr., Inc.*, 253 N.C. App. 378, 382, 800 S.E.2d 716, 720 (2017) (citation omitted). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Sony Ericsson Mobile Communications USA, Inc. v. Agere Systems, Inc.*, 195 N.C. App. 577, 579, 672 S.E.2d 763, 765 (2009) (citation and quotation marks omitted).

In general, a court interprets a contract according to the intent of the parties to the contract. Further, the Supreme Court of North Carolina has held that where parties to a contract have agreed that a given jurisdiction’s substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect.

Szymczyk v. Signs Now Corp., 168 N.C. App. 182, 186, 606 S.E.2d 728, 732 (2005) (citations and quotation marks omitted). Specifically, when a contract contains a mandatory forum selection clause, it “vest[s] exclusive jurisdiction” in a particular state or court. *US Chem. Storage*, 253 N.C. App. at 383, 800 S.E.2d at 720; *see also S&S Family Bus. Corp. v. Clean Juice Franchising, LLC*, No. COA19-264, 2020 WL 549627, *3 (N.C. Ct. App. Feb. 4, 2020) (unpublished) (“A mandatory forum selection clause vests exclusive jurisdiction in a particular state or court.”).

Delongy Stores and Shaw stipulated that the forum selection clause at issue here is mandatory. In fact, the forum selection clause explicitly states that the Consignment Agreements are subject to “the laws of the State of Georgia.” Thus, we apply Georgia law to determine whether the forum selection clause is valid.

Georgia courts have adopted the United States Supreme Court’s ruling in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 SC 1907, 32 LE2d 513 (1972), that forum selection clauses are *prima facie* valid and should be enforced unless the opposing party shows that enforcement would be unreasonable under the circumstances.

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Equity Tr. Co. v. Jones, 339 Ga. App. 11, 11, 792 S.E.2d 458, 459 (2016) (citation and quotation marks omitted).

To invalidate a mandatory forum selection clause under Georgia law, the opposing party must show that trial in the chosen forum will be so inconvenient that he will, for all practical purposes, be deprived of his day in court. A freely negotiated agreement *should be upheld* absent a compelling reason such as fraud, undue influence, or overweening bargaining power.

OFC Capital v. Colonial Distrib.'s, 285 Ga. App. 815, 817, 648 S.E.2d 140, 142 (2007) (emphasis added) (citation and quotation marks omitted).

Shaw contends that enforcement of the forum selection clause may increase the risk of inconsistent outcomes. However, Shaw has not demonstrated that trial in Georgia would be “so inconvenient” that it will “be deprived of its day in court.” *Id.* at 817, 648 S.E.2d at 142 (citation and quotation marks omitted). In fact, Shaw is having its day in court as evidenced by the lawsuit that it filed against Delongy Stores in Georgia. Moreover, Shaw has failed to allege or demonstrate a compelling reason that the forum selection clause, which establishes venue in Shaw’s home state, was the result of “fraud, undue influence, or overweening bargaining power.” *Id.* at 817, 648 S.E.2d at 142 (citation and quotation marks omitted). We note that not only did Shaw draft the forum selection clause, but has also relied on its enforceability in the pending Georgia case. Specifically, Shaw previously stated that the “contractual forum selection clause is enforceable and is mandatory and that any dispute between Shaw and the Delongy [Stores] arising out of the Consignment Agreement *must be litigated* in the Putnam County, Georgia Superior Court.” (emphasis added).

Based on the record, Shaw has failed to demonstrate that the forum selection clause is unenforceable. Thus, the trial court erred when it failed to enforce the mandatory forum selection clause and granted Delongy Stores’ motion to dismiss for improper venue. *Id.* at 817, 648 S.E.2d at 142. We remand with instructions to enter an order dismissing Shaw’s third-party complaint for improper venue.

B. Lack of Personal Jurisdiction

[6] “When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court.” *Banc of Am. Secs. LLC v. Evergreen Int’l*

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Aviation, Inc., 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005) (citation and quotation marks omitted). “Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding.” *City of Asheville v. Aly*, 233 N.C. App. 620, 625, 757 S.E.2d 494, 499 (2014) (citation omitted).

When a defendant challenges personal jurisdiction pursuant to Rule 12(b)(2),

a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based on affidavits. . . . Of course, this procedure does not alleviate the plaintiff’s ultimate burden of proving personal jurisdiction at an evidentiary hearing or at trial by a preponderance of the evidence.

Bruggeman v. Meditrust Acquisition Co., 138 N.C. App. 612, 615, 532 S.E.2d 215, 217 (2000) (citations omitted). When “the trial court chooses to decide the motion based on affidavits, the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror.” *Banc of Am. Secs.*, 169 N.C. App. at 694, 611 S.E.2d at 183 (*purgandum*). It is not for this Court to “reweigh the evidence presented to the trial court.” *Don’t Do It Empire, LLC v. TennTex*, 246 N.C. App. 46, 57, 782 S.E.2d 903, 910 (2016) (citation and quotation marks omitted).

When reviewing the issue of personal jurisdiction on appeal, this Court “employs a two-step analysis.” *Skinner v. Preferred Credit*, 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006). “First, jurisdiction over the action must be authorized by N.C.G.S. § 1-75.4, our state’s long-arm statute.” *Id.* at 119, 638 S.E.2d at 208 (citation omitted). “Second, if the long-arm statute permits consideration of the action, exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.” *Id.* at 119, 638 S.E.2d at 208.

“[N.C. Gen. Stat. §] 1-75.4 is commonly referred to as the ‘long-arm’ statute.” *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977). Specifically, a North Carolina court has personal jurisdiction “[i]n any action which . . . [r]elates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction[.]” N.C. Gen. Stat. § 1-75.4(5)(d) (2019). “Essentially, this section of the long-arm statute reaches defendants who engage in commercial transactions with residents of this state.” *Skinner*, 361 N.C. at 120, 638 S.E.2d at 209 (citing *Johnston Cnty. v. R.N. Rouse & Co. Inc.*, 331 N.C. 88, 95, 414 S.E.2d 30, 35 (1992)

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(describing N.C. Gen. Stat. § 1-75.4(5) as “authoriz[ing] the courts of North Carolina to exercise jurisdiction over a nonresident contracting within the state or contracting to perform services within the state”). As the third-party plaintiff, Shaw “has the burden of establishing prima facie evidence that one of the statutory grounds [for personal jurisdiction] applies.” *Chapman v. Janko, U.S.A. Inc.*, 120 N.C. App. 371, 374, 462 S.E.2d 534, 536 (1995) (citation omitted); *see also Miller v. Szilagyi*, 221 N.C. App. 79, 84-85, 726 S.E.2d 873, 878-79 (2012) (“[T]he plaintiff bears the burden of proving, by a preponderance of the evidence, grounds for exercising personal jurisdiction over a defendant.” (citation omitted)).

Here, Millar did not act “at the order or direction” of Delongy Stores, but rather at the “order or direction” of Shaw. Pursuant to the Consignment Agreements, Delongy Stores “select[s] the inventory to be consigned to them” and Shaw is then “responsible for approving the amount of inventory requested[.]” Once approved, Shaw then “deliver[s] or cause[s] to be delivered” the selected inventory to Delongy Stores. Further, there was evidence before the trial court that “since about 2012 . . . [Millar] has always sent its invoices and its account statements directly to Shaw, and Shaw has always paid those invoices and account statements for merchandise that was shipped to [Delongy Stores].” The only goods “shipped from [North Carolina]” were those items that Shaw contracted for and purchased from Millar, which Delongy Stores previously requested from Shaw. Moreover, all of Delongy Stores’ orders and directions to Shaw occurred in either Florida or Georgia, not North Carolina. *See Skinner*, 361 N.C. at 120, 638 S.E.2d at 209 (finding N.C. Gen. Stat. § 1-75.4(5)(d) did not confer personal jurisdiction over a non-resident defendant because “[t]here [was] no direct contact between plaintiffs and the [nonresident defendant].”).

Although Shaw argues Delongy Stores ordered directly from Millar, there is no competent evidence in the record to suggest that there was direct contact between Millar and Delongy Stores. Rather, the only evidence in the record alleging direct orders between Delongy Stores and Millar are conclusory statements in Shaw’s answer and interrogatories. These general statements, without more, do not demonstrate direct orders between Delongy Stores and Millar. Thus, Shaw, as the third-party plaintiff, has failed “to establish itself within some ground for the exercise of personal jurisdiction” over Delongy Stores. *Parker v. Pfeffer*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2020). Therefore, the trial court’s finding that N.C. Gen. Stat. § 1-75.4(5)(d) applies here is not supported by competent evidence.

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While the dissent asserts that Delongy Stores and Millar “dealt with each other directly with relation to goods shipped from this State” and that this ought to be “sufficient to maintain personal jurisdiction” under our long-arm statute, this reasoning ignores the second operative portion of N.C. Gen. Stat. § 1-75.4(5)(d). In fact, N.C. Gen. Stat. § 1-75.4(5)(d) requires both that the action relate to goods shipped from our State and also that those goods were shipped to *the defendant on the defendant’s* order or direction. The General Assembly could have applied this long-arm provision to all transactions involving goods shipped from this State, but instead chose narrower language. Accordingly, we must apply that plain language and, here, there simply is no evidence to satisfy the second prong of N.C. Gen. Stat. § 1-75.4(5)(d).

Here, Shaw served as a consignment intermediary between Millar and Delongy Stores, and there is insufficient evidence of direct contact or of a contractual agreement between Millar and Delongy Stores to confer jurisdiction under N.C. Gen. Stat. § 1-75.4(5)(d). Even assuming Shaw “caused [Millar] to deliver[]” the selected inventory shipments directly to Delongy Stores, this is insufficient for purposes of N.C. Gen. Stat. § 1-75.4(5)(d) because Delongy Stores did not directly order from Millar. *See Robbins v. Ingham*, 179 N.C. App. 764, 769, 635 S.E.2d 610, 614-15 (2006) (refusing to impute the affirmative actions of an intermediary to a third-party defendant for purposes of establishing personal jurisdiction under N.C. Gen. Stat. § 1-75.4(5)(d)). Therefore, “[b]ecause [Shaw] has failed to meet [its] burden of proving a statutory basis for personal jurisdiction, we need not conduct a due process inquiry because any further inquiry will be fruitless.” *Parker*, ___ N.C. App. at ___, ___ S.E.2d at ___; *see also Skinner*, 361 N.C. at 120, 638 S.E.2d at 209 (ending its personal jurisdiction analysis after concluding that “[a]lthough [N.C. Gen. Stat. § 1-75.4(5)(d)’s] grant of jurisdiction is far-reaching, the transactions in this case do not fall within its grasp.”).

Thus, we remand with instructions to enter an order dismissing the third-party complaint for lack of personal jurisdiction.

Conclusion

For the foregoing reasons, we dismiss Delongy Stores’ appeal on the issue of attorneys’ fees as interlocutory. We affirm the trial court’s order granting the motion to stay, and remand with instructions to enter an order dismissing Shaw’s complaint for improper venue and lack of personal jurisdiction.

DISMISSED IN PART; AFFIRMED IN PART; AND REMANDED IN PART.

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Judge DIETZ concurs.

Judge ARROWOOD concurs in part, dissents in part.

ARROWOOD, Judge, concurs in part and dissents in part.

I concur in the portion of the majority opinion that affirms the trial court's order granting the motion to stay. I further agree that the forum selection clause under the contract is valid, however, I would vacate the order denying dismissal with respect to that issue and remand this matter to the trial court to enter an order making appropriate findings of fact with respect to the issue of whether there are appropriate reasons under Georgia law as constrained by United States Supreme Court precedent for North Carolina to refuse to honor that provision of the contract. I respectfully dissent from the portion of the majority opinion holding the trial court lacked personal jurisdiction over the third-party defendants.

I. Venue

Although the cases which address contract forum selection clauses normally deal with both jurisdiction and venue and the two issues are sometimes "blurred," the two inquiries are different. *ITS Leasing, Inc. v. RAM DOG Enterprises, LLC*, 206 N.C. App. 572, 578, 696 S.E.2d 880, 884 (2010) (citing *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 144, 423 S.E.2d 780, 783 (1992)). Generally, "courts no longer view forum selection clauses as ousting the courts of their jurisdiction[,] but instead "allow a court to refuse to exercise that jurisdiction in recognition of the parties' choice of a different forum." *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 143, 423 S.E.2d 780, 782 (1992).

In this case, the Consignment Agreements between Delongy and Shaw include the following forum selection clause, in relevant part:

This Agreement will be governed by and construed in accordance with the laws of the State of Georgia. The parties agree that the situs and venue of any suit commenced under this contract shall be Putnam County, Georgia. The parties further agree that any negotiations on transactions affecting this contract and the entry into this contract shall be deemed to have taken place in Putnam County, Eatonton, Georgia. [Delongy Stores] hereby consents to the personal jurisdiction of the courts of Putnam County, Georgia, and agrees to acknowledge service of any suit filed against [Delongy Stores] by [Shaw] in Putnam County, Georgia.

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As the clause makes apparent, although the venue “shall be” designated in Georgia, the matter of jurisdiction is separate.

Defendant concedes that the forum selection clause is enforceable, however, they argue that they can avoid its enforcement by showing that it is “unfair or unreasonable.” See *Perkins*, 333 N.C. at 146, 423 S.E.2d at 784 (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 32 L. Ed. 2d 513 (1972)).

I believe that the trial court needs to make findings of fact and conclusions of law with respect to this enforceability under the standard for enforceability set forth by the United States Supreme Court in *Bremen* in order for us to appropriately review the same. I do not believe that we, as a matter of law, can make the determination reached by the majority that the forum selection clause is enforceable without findings from the trial court under the test established by *Bremen* as to whether it would be unfair or unreasonable to enforce based upon the facts of this case. Therefore, I would hold that the trial court erred in failing to make appropriate findings of fact and conclusions of law with respect to why the forum selection clause should not be enforced. I would vacate that portion of the order and remand this issue to the trial court to make the appropriate finding and conclusion.

II. Personal Jurisdiction

The majority concludes that the forum selection clause is mandatory and vests exclusive jurisdiction in Georgia, in addition to asserting that there was not competent evidence to establish grounds for the exercise of personal jurisdiction under the long-arm statute. I respectfully disagree with the majority's statutory analysis and application of our caselaw.

As previously noted, the issues of venue and jurisdiction require separate analyses in the context of forum selection clauses. The general rule is when a jurisdiction is specified in a provision of contract, the provision generally will not be enforced as a mandatory selection clause with respect to jurisdiction without some further language that indicates the parties' intent to make jurisdiction exclusive. *Printing Servs. of Greensboro, Inc. v. Am. Capital Grp., Inc.*, 180 N.C. App. 70, 74, 637 S.E.2d 230, 232 (2006), *aff'd*, 361 N.C. 347, 643 S.E.2d 586 (2007). Indeed, mandatory forum selection clauses recognized by our appellate courts have contained words such as “exclusive” or “sole” or “only” which indicate that the contracting parties intended to make jurisdiction exclusive. *Id.* This Court has not interpreted the phrase “shall be” as sufficient to create a mandatory forum selection clause. *R.H. Donnelley Inc. v. Embarq Corp.*, 228 N.C. App. 568, 749 S.E.2d 112, 2013 WL 4005261, *3

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(2013) (unpublished) (citing *Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 568, 566 S.E.2d 160, 162 (2002); *Cable Tel Servs., Inc. v. Overland Contr'g, Inc.*, 154 N.C. App. 639, 645, 574 S.E.2d 31, 35 (2002)).

In this case, the forum selection clause states that the “situated and venue of any suit commenced under this contract *shall be* Putnam County, Georgia[,]” and goes on to acknowledge that Delongy Stores “consents to the personal jurisdiction of the courts of Putnam County, Georgia[.]” While this certainly allows Georgia courts to exercise jurisdiction over Delongy Stores, it does not include language that indicates that the parties intended to make jurisdiction exclusive, nor does it preclude the exercise of jurisdiction in North Carolina.

In examining whether a non-resident defendant is subject to personal jurisdiction in our courts, we engage in a two-step analysis. *Beem USA Ltd.-Liab. Ltd. P'ship v. Grax Consulting LLC*, 373 N.C. 297, 302, 838 S.E.2d 158, 161 (2020) (citing *Skinner v. Preferred Credit*, 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006)). First, jurisdiction over the defendant must be authorized by N.C. Gen. Stat. § 1-75.4—North Carolina's long-arm statute. *Id.* Second, “if the long-arm statute permits consideration of the action, exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.” *Id.* (quotation marks omitted).

A. The Long-Arm Statute

This Court has held that “[w]hile choice of law clauses are not determinative of personal jurisdiction, they express the intention of the parties and are a factor in determining whether minimum contacts exist and due process was met.” *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 700, 611 S.E.2d 179, 186 (2005) (internal quotation marks and citation omitted). Thus, while we must consider this clause in our due process analysis, it does not, standing alone, operate to defeat personal jurisdiction over third-party defendants. *R.H. Donnelley Inc.*, 2013 WL 4005261 at *3 (citing *Banc of Am. Secs. LLC*, 169 N.C. App. at 700, 611 S.E.2d at 186).

In this case, I would hold that there is statutory authority under N.C. Gen. Stat. § 1-75.4(5)(d). A North Carolina court has personal jurisdiction “[i]n any action which . . . [r]elates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction.” N.C. Gen. Stat. § 1-75.4(5)(d) (2019). “Essentially, this section of the long-arm statute reaches defendants who engage in commercial transactions with residents of this [S]tate.” *Skinner*, 361 N.C. at 120, 638 S.E.2d at 209.

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North Carolina's long-arm statute

is liberally construed to find personal jurisdiction over nonresident defendants to the full extent allowed by due process. Accordingly, when evaluating the existence of personal jurisdiction pursuant to [this statute], the question of statutory authorization collapses into the question of whether [the defendant] has the minimum contacts with North Carolina necessary to meet the requirements of due process.

Lulla v. Effective Minds, LLC, 184 N.C. App. 274, 277, 646 S.E.2d 129, 132 (2007) (citation omitted).

Although the majority seeks to engage in a plain language analysis of the long-arm statute, I would adhere to the liberal construction of the long-arm statute in accordance with our precedent. I am concerned by the potential implications of the majority's holding. By narrowly interpreting the long-arm statute, the majority opinion effectively creates a loophole to allow individuals and corporations to shield themselves from the exercise of personal jurisdiction in North Carolina by conducting business through an intermediary. Although I do not seek to apply the long-arm statute to all transactions involving goods shipped from this State, as the majority suggests, I believe the facts of this case, specifically the intertwined nature of the business relationships and the knowledge of Delongy Stores that it was ordering goods from a North Carolina vendor, require a holding that the third-party defendants are subject to the jurisdiction of North Carolina courts. While the facts in this case are unique in that the North Carolina entity that sold and shipped the goods is not seeking to invoke jurisdiction against the ultimate recipient of those goods, because they are suing a third-party to recover for those goods, I believe that this provision of the long-arm statute is met and that jurisdiction lies against the third-party defendants to the extent that it is not violative of due process.

I further dissent from the majority's holding that there was insufficient evidence to support the trial court's order denying the motion to dismiss. Under N.C. Gen. Stat. § 1A-1, Rule 52(a)(2), the trial judge need not make findings of fact and conclusions of law when making a decision on a motion unless they are requested by a party or required by Rule 41(b) which is not applicable here. *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367, 276 S.E.2d 521, 524 (1981). When the record contains no findings of fact, " '[i]t is presumed . . . that the court on proper evidence found facts to support its judgment.' " *Id.* (quoting *Sherwood*

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v. Sherwood, 29 N.C. App. 112, 113-14, 223 S.E.2d 509, 510-11 (1976)). On review, this Court is “not free to revisit questions of credibility or weight that have already been decided by the trial court.” *Banc of Am. Secs. LLC*, 169 N.C. App. at 695, 611 S.E.2d at 183.

In this case, as in *Fungaroli* and *Banc of America Securities LLC*, the record contains no indication that the parties requested that the trial judge make specific findings of fact, nor did the order contain any findings of fact. Accordingly, we must presume that the trial judge made factual findings sufficient to support ruling in favor of Shaw. It is this Court’s task to review the record to determine whether there is any evidence to support the trial court’s conclusion that North Carolina courts may exercise jurisdiction over Delongy Stores without violating Delongy Stores’ due process rights.

The record reflects that the third-party defendants Delongy Stores ordered merchandise directly from plaintiff, Millar, who then shipped the merchandise from North Carolina. The majority’s observation that defendant Shaw’s received “invoices and account statements for every bit of merchandise that was shipped,” ignores the fact that Delongy Stores and Millar dealt with each other directly with relation to goods shipped from this State. Although defendant Shaw was primarily involved in the overall business arrangement, the alleged “over-orders” by Delongy Stores and the direct transactions between Delongy Stores and Millar are in my opinion sufficient to maintain personal jurisdiction over Delongy Stores in this matter. The existence of Shaw as an intermediary does not change the fact that Delongy Stores has availed themselves of the privilege of purchasing and receiving goods from this State.

B. Due Process

The second step under N.C. Gen. Stat. § 1-75.4 is whether the exercise of personal jurisdiction by North Carolina courts violates due process of law. “By the enactment of [N.C. Gen. Stat. §] 1-75.4(1)(d), it is apparent that the General Assembly intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process.” *Dillon v. Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977).

To satisfy the requirements of the due process clause, there must exist “certain minimum contacts [between the non-resident defendant and the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’ ” *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 283 (1940)). In

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each case, there must be some act by which the defendant purposefully avails themselves of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws; the unilateral activity within the forum state of others who claim some relationship with a non-resident defendant will not suffice. *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298 (1958). This relationship between the defendant and the forum must be “such that [they] should reasonably anticipate being haled into court there.” *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365-66, 348 S.E.2d 782, 786 (1986) (internal quotation marks and citation omitted). Following the mandate of the United States Supreme Court, our courts have rejected any *per se* rule of long-arm jurisdiction. *Buying Group v. Coleman*, 296 N.C. 510, 251 S.E.2d 610 (1979).

Although a contractual relationship between a North Carolina resident and an out-of-state party alone does not *automatically* establish the necessary minimum contacts with this State, nevertheless, a single contract may be a sufficient basis for the exercise of personal jurisdiction if it has a substantial connection with this State. *Tom Togs*, 318 N.C. at 367, 348 S.E.2d at 786. In *Tom Togs*, our Supreme Court analyzed whether a contract between a North Carolina resident plaintiff and a non-resident defendant for the sale of shirts presented a substantial connection with this State. The defendant in *Tom Togs* was aware that the plaintiff was a North Carolina resident, and that the shirts were to be shipped from this State. *Id.*, 318 N.C. at 367, 348 S.E.2d at 787. Accordingly, our Supreme Court held that the contract and business dealings between defendant and plaintiff created a “substantial connection” with this State.

Here, as in *Tom Togs*, third-party defendants Delongy Stores were aware that plaintiff Millar is a North Carolina resident, and each party maintained a series of business transactions involving the shipment of clothing from a North Carolina resident plaintiff to a non-resident defendant. Although there was not a written contract between Delongy Stores and Millar, the nature of the business transactions and the ongoing business relationship between the plaintiff and the third-party defendants which resulted in the alleged debt that plaintiff is suing defendant Shaw over in my opinion presents a “substantial connection” with this State.

Accordingly, both steps of analysis under the North Carolina long-arm statute are satisfied, and the exercise of personal jurisdiction over Delongy Stores does not violate due process requirements. Therefore, I would hold that the trial court did not err in denying the third-party defendants’ motion to dismiss for lack of personal jurisdiction.

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III. Conclusion

I would affirm the order denying the motion to dismiss for lack of jurisdiction, vacate the order denying the motion to dismiss for improper venue and remand for the trial court to make findings of fact with respect to whether third-party plaintiff can meet the standard established under *Bremen* to circumvent the forum selection clause under the contract between Shaw and Delongy Stores. While Georgia law applies, it is constrained by the overarching mandate of the United States Supreme Court with respect to the enforcement of forum selection clauses.

STATE OF NORTH CAROLINA
v.
DERICK CLEMONS, DEFENDANT

No. COA20-45

Filed 1 December 2020

1. Evidence—authentication—standard of review—de novo

The Court of Appeals reviewed the state's case law and held that the appropriate standard of review for authentication of evidence is de novo.

2. Evidence—authentication—screenshots of social media posts — photographs and written statements—circumstantial evidence

In a prosecution for defendant's violation of a domestic violence protective order, screenshots of social media posts were properly admitted where sufficient circumstantial evidence authenticated the screenshots as both photographs and written statements. The victim gave sufficient testimony that she had taken the screenshots and that defendant was the person who had made the comments—even though the comments were made through their daughter's account, the evidence permitted the reasonable conclusion that defendant had access to the daughter's account and wrote the comments after he was released from jail.

Judges BRYANT and BERGER concurring in result only.

Appeal by Defendant from judgment entered 28 August 2019 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 12 May 2020.

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Attorney General Joshua H. Stein, by Assistant Attorney General Bethany A. Burgon, for the State.

Benjamin J. Kull for defendant-appellant.

MURPHY, Judge.

Before screenshots of an online written statement on social media can be admitted into evidence they must be authenticated as both a photograph and a written statement. To authenticate evidence in this manner, there must be circumstantial or direct evidence sufficient to conclude a screenshot accurately represents the content on the website it is claimed to come from and to conclude the written statement was made by who is claimed to have written it. Here, screenshots of comments on Facebook posts, made by an account not in Defendant's name, were properly authenticated because there was sufficient circumstantial evidence to show the screenshots of the Facebook comments in fact depicted the Facebook posts and comments and to show the Facebook comments were made by Defendant. We hold there was no error.

BACKGROUND

On 9 June 2017, Inez DeJesus renewed her domestic violence protective order ("DVPO") prohibiting contact of any kind by Defendant, Derick Clemons, in anticipation of his release from prison. Later in June 2017, Defendant was released from prison and picked up by his and DeJesus's daughter. Shortly after, on 5 July 2017, DeJesus started receiving phone calls from a restricted number, which later were determined to all come from the same number. She received these calls every day and often multiple times in a single day from 5 July 2017 to 11 July 2017, sometimes also receiving voicemails left in Defendant's voice and referring to events she and Defendant had engaged in together. During this time period, there were comments made on DeJesus's Facebook posts, from her daughter's account, that DeJesus didn't think her daughter would have posted ("Facebook comments").

On 11 July 2017, DeJesus reported these events to police and showed police officers the Facebook comments and the phone calls from a restricted number, and played the voicemails left by the number. Based on these communications, police officers obtained a warrant for Defendant's arrest for violation of the DVPO, and he was subsequently arrested. Following his arrest, DeJesus did not receive any more calls from restricted numbers, or Facebook comments from her daughter's account seeming to come from someone else.

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Pre-trial, Defendant filed a motion in limine seeking to exclude testimony regarding the Facebook comments based on a lack of connection between Defendant and his daughter's Facebook account. The trial court denied this motion based on the State's assertion DeJesus would testify the posts came from Defendant, not their daughter.¹ At trial, the Facebook comments were admitted and considered authenticated based on the testimony of DeJesus. Prior to the admission of the screenshots of the Facebook comments, DeJesus testified as follows:

[THE STATE:] Any idea who met him when he was released?

[DEJESUS:] Yes, I do know who.

[THE STATE:] Who is that?

[DEJESUS:] Our daughter, Ashley Clemons.

[THE STATE:] What is your relationship like with Ashley?

[DEJESUS:] As of right now, it's getting better.

[THE STATE:] How has it been prior to now?

[DEJESUS:] It was very rocky.

[THE STATE:] Why was it a rocky relationship with Ashley?

[DEJESUS:] Because, you know, she was our first daughter, his first daughter. So she has a real good connection with her dad.

[THE STATE:] After you became aware that [D]efendant was released, did you have any -- in those initial days, did you receive any sort of strange contact?

[DEJESUS:] Not right -- right before he got out -- not during -- he got -- not -- I have, but not as soon as he got out.

[THE STATE:] Okay. About how long after he got out did you start receiving the contact?

[DEJESUS:] Maybe a week or two.

1. In part, the State contended police reports would show Defendant made these comments, not the daughter, however these reports were not introduced into evidence and are not a part of the Record.

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[THE STATE:] Okay. And did you receive phone calls on your cell phone from a private or blocked number?

[DEJESUS:] Yes, I have.

[THE STATE:] When did you start receiving those calls?

[DEJESUS:] It was July 5th.

[THE STATE:] Of what year?

[DEJESUS:] Of 2018 – 2017.

[THE STATE:] The phone number that you had back in 2017, how long had you had that phone number?

[DEJESUS:] Since 2011.

[THE STATE:] So in 2011, you changed your cell phone number?

[DEJESUS:] I did.

...

[THE STATE:] Prior to July 5th of 2017, had you been receiving calls on your cell phone from either a blocked or private number?

[DEJESUS:] No, I haven't.

[THE STATE:] How many calls, Inez, would you estimate you received from a private or blocked number starting on July 5th and continuing thereafter?

[DEJESUS:] I don't know -- I can't remember how many, but it was -- it was plenty enough for me to call.

[THE STATE:] Did you answer any of those calls?

[DEJESUS:] I did not. If I don't know the person, I won't. If it was important, they will leave a message.

[THE STATE:] When you initially started getting those unknown or private calls on your cell phone, were voice messages left?

[DEJESUS:] There was.

[THE STATE:] Okay. Did that occur right away or did that occur some time later?

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[DEJESUS:] Maybe like two days after.

[THE STATE:] Okay. About how long were you receiving those calls and voice messages from the blocked or private number?

[DEJESUS:] Up until July 11th.

[THE STATE:] So from July 15th -- I'm sorry, July 5 to July 11, 2017?

[DEJESUS:] Correct.

[THE STATE:] Do you recall what, if anything, was left on any of those voice messages?

[DEJESUS:] To stand out, we went on vacation to Miami and we went to Bahamas on a cruise ship.

[THE STATE:] And when you say "we went," who is "we"?

[DEJESUS:] Me and him and two females.

[THE STATE:] Okay. And when did you go on that vacation to Miami and the Bahamas?

[DEJESUS:] I don't know the exact year, but it was maybe like April sometime.

[THE STATE:] Okay. That was before 2011?

[DEJESUS:] Right. It was sometime in 2000s, when we were in a marriage together.

[THE STATE:] Okay. Is it fair to say it was a long time before 2017?

[DEJESUS:] Yes.

[THE STATE:] When you say that one of those messages said "Miami, Bahamas," was that the extent of the message?

[DEJESUS:] That's all that was said.

[THE STATE:] Did you recognize the voice --

[DEJESUS:] I did.

[THE STATE:] -- in that voice mail?

[DEJESUS:] I did.

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[THE STATE:] And whose voice was that?

[DEJESUS:] Mr. Clemons.

[THE STATE:] That's the defendant in this case?

[DEJESUS:] Yes.

[THE STATE:] Why is that particular event, the Miami, Bahamas, of significance to you?

[DEJESUS:] Because he is the only guy that I went on a trip with.

[THE STATE:] Was this something that would have been common knowledge to people?

[DEJESUS:] No, not -- if I told them.

[THE STATE:] Do you recall any of the other voice messages that were left?

[DEJESUS:] There was one I really -- I forgot what it said, but it was something like --

[DEFENDANT:] Oh, Your Honor, I'm sorry. We would move to strike the evidence as far as the phone calls based on the arguments that we previously made. We'd move to strike -- object to the questions and move to strike the testimony based on arguments we previously made to the Court.

THE COURT: Right. That objection is overruled. You may answer the question.

[THE STATE:] To go back, Inez, do you recall any other voice messages that were left for you from an either blocked or private number?

[DEJESUS:] Yes.

[THE STATE:] Okay. And do you recall the voice on that voice message?

[DEJESUS:] Yes. [THE STATE:] Whose voice was that?

[DEJESUS:] Mr. Clemons.

[THE STATE:] Okay. And do you recall the content of that voice message?

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[DEJESUS:] Yes.

[THE STATE:] What was contained in that voice message?

[DEJESUS:] It was something like he's going to come get me or get something – I don't really clearly remember.

[THE STATE:] Did you perceive it as threatening?

[DEJESUS:] Yes.

[THE STATE:] Did you receive any other voice messages that you can recall?

[DEJESUS:] I did, but it wasn't like -- it was no voice after. It was just like him just being on the phone breathing.

[THE STATE:] You could hear breathing on the phone?

[DEJESUS:] Yes.

[THE STATE:] What times of day were these calls and voice messages coming in to you?

[DEJESUS:] I can recall one was like in the morning, one was in the afternoon and one was in the evening time.

[THE STATE:] So all throughout the day?

[DEJESUS:] Yeah.

[THE STATE:] During this same time period, did you start to receive – do you have a Facebook page?

[DEJESUS:] I do have a Facebook.

[THE STATE:] And is that page something that has your name on it that identifies you?

[DEJESUS:] Yes.

[THE STATE:] Did you also start to receive comments left on posts that you made on Facebook?

[DEJESUS:] I did.

MS. FETTER: Your Honor, may I approach?

THE COURT: Yes.

(State's Exhibits 4 - 6 marked for identification.)

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[THE STATE:] Inez, I'm showing you what's been previously marked for identification purposes as State's Exhibit 4, 5 and 6. Will you take a look at those please and let me know if you recognize them.

[DEJESUS:] Yep. Yes, I do.

[THE STATE:] What are State's Exhibit 4, 5 and 6?

[DEJESUS:] They're my posts on -- Facebook posts.

[THE STATE:] And what about State's Exhibit 4, 5 and 6 -- did you take screenshots?

[DEJESUS:] I did.

[THE STATE:] Okay. Is that what these are?

[DEJESUS:] Yes.

[THE STATE:] And why did you specifically screenshot State's Exhibits 4, 5 and 6 from your Facebook page?

[DEFENDANT:] Your Honor, again, we would object to the questions and move to strike the testimony based on arguments previously made in court.

THE COURT: The objection's overruled.

[DEJESUS:] Because I know my daughter wouldn't write none of this stuff on my page. She never posts on my Facebook.

[THE STATE:] And we'll talk about that in one second, Inez. These are messages that --

[DEJESUS:] Yes.

[THE STATE:] -- you received on Facebook?

[DEJESUS:] Yes.

[THE STATE:] Your Honor, at this time the State moves Exhibits 4, 5 and 6 into evidence.

[DEFENDANT:] Objection on the grounds previously stated.

THE COURT: The objection is overruled. Four, Five and Six are admitted.

(State's Exhibits 4 - 6 admitted into evidence.)

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On appeal, Defendant contends the admission of the testimony and exhibits related to the Facebook comments was improper because the Facebook comments were not properly authenticated as being made by Defendant. Additionally, on appeal the parties dispute whether abuse of discretion or de novo review is appropriate for authentication issues.

ANALYSIS**A. Standard of Review**

[1] Defendant contends we review de novo a decision regarding authentication; whereas, the State contends we review for an abuse of discretion. “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-633, 669 S.E.2d 290, 294 (2008) (citations and internal marks omitted). “Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). We hold the appropriate standard of review for authentication of evidence is de novo.²

At first glance, “[t]he cases from the Court of Appeals are in conflict regarding whether an abuse of discretion or de novo standard of review is appropriate in the context of authentication of documentary evidence.” *In re Lucks*, 369 N.C. 222, 231, 794 S.E.2d 501, 508 (2016) (Hudson, J., concurring). However, upon a closer look, it appears our rule is to review trial court decisions regarding authentication de novo. The two cases cited by the State here and Justice Hudson in *In re Lucks* to support the idea that abuse of discretion review has been conducted on authentication issues are not convincing. See *In re Lucks*, 369 N.C. at 231, 794 S.E.2d at 508 (Hudson, J., concurring) (citing *In re Foreclosure by Goddard & Peterson, PLLC*, 248 N.C. App. 190, 200, 789 S.E.2d 835, 842 (2016); *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (2006)).

In the first case, *In re Foreclosure by Goddard & Peterson, PLLC*, we treated the issue of authentication as abandoned due to the appellant’s

2. While not making any determination as to the prejudicial effect of such an abuse of discretion, we note if we were to accept the State’s standard of review argument, we would find the trial court’s decision to be an abuse of discretion based on its misapprehension of law when it said, “I think that it goes to the weight rather than the admissibility. It is a question for the jury to decide who authored those posts.” On the contrary, there must be sufficient evidence to conclude Defendant authored the posts before the jury could review the evidence. See *State v. Nunez*, 204 N.C. App. 164, 170, 693 S.E.2d 223, 227 (2010) (“When a trial [court] acts under a misapprehension of the law, this constitutes an abuse of discretion.”).

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failure to cite legal authority to support the claim as required by N.C. R. App. P. 28(b)(6). *In re Foreclosure by Goddard & Peterson, PLLC*, 248 N.C. App. at 200, 789 S.E.2d at 843. This case does not establish or discuss a standard of review for a trial court's determination regarding the authentication of evidence.

In the second case, *Brown v. City of Winston-Salem*, we reviewed whether spreadsheets intended to be introduced into evidence were properly authenticated. *Brown*, 176 N.C. App. at 505, 626 S.E.2d at 753. In *Brown*, we determined the spreadsheets were not properly authenticated and held "the trial court's ruling that petitioners' spreadsheets could be admitted only for the limited purpose [the parties had stipulated to] was proper, and did not constitute an abuse of discretion." *Id.* at 506, 626 S.E.2d at 753. Although we determined the evidence was not properly authenticated, we did not address the authentication determination; instead, we concluded an abuse of discretion did not occur in the decision to admit the evidence for the limited purpose stipulated to by the parties. At no point did we set out a standard of review for authentication specifically. We simply stated "[o]n appeal, the standard of review of a trial court's decision to exclude or admit evidence is that of an abuse of discretion." *Brown*, 176 N.C. App. at 505, 626 S.E.2d at 753 (2006) (citing *Williams v. Bell*, 167 N.C. App. 674, 678, 606 S.E.2d 436, 439 (2005)). Additionally, *Williams* only referred to decisions to exclude evidence and ultimately concluded the excluded evidence there was irrelevant under Rule 401. *Williams*, 167 N.C. App. at 678, 606 S.E.2d at 439. At no point does *Williams* discuss authentication. *Id.*

Conversely, the cases in which we review authentication explicitly state *de novo* is the appropriate standard of review. We have repeatedly stated "[a] trial court's determination as to whether a document has been sufficiently authenticated is reviewed *de novo* on appeal as a question of law." See *State v. DeJesus*, 265 N.C. App. 279, 288, 827 S.E.2d 744, 751, *disc. review denied*, 372 N.C. 707, 830 S.E.2d 837 (2019); *State v. Allen*, 258 N.C. App. 285, 288, 812 S.E.2d 192, 195, *disc. review denied*, 371 N.C. 449, 817 S.E.2d 202 (2018); *State v. Ford*, 245 N.C. App. 510, 517, 782 S.E.2d 98, 104 (2016); *State v. Hicks*, 243 N.C. App. 628, 638, 777 S.E.2d 341, 348 (2015); *State v. Watlington*, 234 N.C. App. 580, 590, 759 S.E.2d 116, 124 (2014) (applying this standard of review to text messages); *State v. Crawley*, 217 N.C. App. 509, 515, 719 S.E.2d 632, 637 (2011). *Crawley* was the first case to state this rule in these terms and its holding can be traced back to *State v. LeDuc*.

In *LeDuc*, our Supreme Court addressed the requirements of authentication in the context of comparing handwritings, stating:

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Before handwritings can be submitted to the jury for its comparison, however, the trial [court] must satisfy [itself] that one of the handwritings is genuine. The statute so provides. We hold, in addition, that the trial [court] must also be satisfied that there is enough similarity between the genuine handwriting and the disputed handwriting, that the jury could reasonably infer that the disputed handwriting is also genuine. *Both of these preliminary determinations by the trial [court] are questions of law fully reviewable on appeal.*

State v. LeDuc, 306 N.C. 62, 73-74, 291 S.E.2d 607, 614 (1982) (emphasis added), *overruled in part on other grounds by State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987); *see also State v. McCoy*, 234 N.C. App. 268, 269-71, 759 S.E.2d 330, 332-33 (2014); *State v. Owen*, 130 N.C. App. 505, 509-10, 503 S.E.2d 426, 429-30 (1998). This reasoning is equally applicable to authentication situations outside of handwriting. *See, e.g., Watlington*, 234 N.C. App. at 591, 759 S.E.2d at 124 (discussing de novo review when the authentication of text messages was at issue).

Furthermore, in *State v. Snead*, our Supreme Court, without explicitly stating it, conducted de novo review of whether the authentication of a video was appropriate.³ *State v. Snead*, 368 N.C. 811, 815-16, 783 S.E.2d 733, 737 (2016). In reversing our decision as to authentication, our Supreme Court stated:

Given that [the] defendant freely admitted that he is one of the two people seen in the video stealing shirts and that he in fact stole the shirts, he offered the trial court no reason to doubt the reliability or accuracy of the footage contained in the video. Regardless, [the witness's] testimony was sufficient to authenticate the video under Rule 901. [The witness] established that the recording process was reliable by testifying that he was familiar with how Belk's video surveillance system worked, that the recording equipment was "industry standard," that the equipment was "in working order" on 1 February 2013, and that the videos produced by the surveillance system

3. We also note in *State v. Snead*, we held "[a] trial court's determination as to whether a videotape has been properly authenticated is reviewed *de novo* on appeal." *State v. Snead*, 239 N.C. App. 439, 443, 768 S.E.2d 344, 347 (2015), *rev'd in part on other grounds*, 368 N.C. 811, 783 S.E.2d 733 (2016) (citing *Crawley*, 217 N.C. App. at 515, 719 S.E.2d at 637).

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contain safeguards to prevent tampering. Moreover, [the witness] established that the video introduced at trial was the same video produced by the recording process by stating that the State's exhibit at trial contained exactly the same video that he saw on the digital video recorder. Because defendant made no argument that the video had been altered, the State was not required to offer further evidence of chain of custody. [The witness's] testimony, therefore, satisfied Rule 901, and the trial court did not err in admitting the video into evidence.

Id. Although not explicitly stated, our Supreme Court analyzed this issue de novo as it "considered the matter anew" and at no point did our Supreme Court reference language related to the abuse of discretion standard in determining this issue.

Based on *Snead*, *LeDuc*, and our extensive caselaw explicitly applying de novo review on issues of authentication, we conduct de novo review of whether the evidence at issue here was properly authenticated.

B. Authentication

[2] Defendant contends the screenshots of the Facebook comments were written statements that must have been authenticated as statements; whereas, the State contends these screenshots were photographs that only needed to be authenticated as photographs. We hold these Facebook comments must have been authenticated as both photographs and written statements.

Rule of Evidence 901(a) reads "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C.G.S. § 8C-1, Rule 901(a) (2019). The State used the screenshots of the Facebook comments to show Defendant violated the DVPO by communicating with DeJesus. In order for the screenshots of the Facebook comments to support finding Defendant contacted DeJesus, the screenshots must have accurately reflected DeJesus's Facebook page. N.C.G.S. § 8C-1, Rule 901(a) (2019). Therefore, the screenshots must have been authenticated as photographs. However, the screenshots of the Facebook comments are also statements—the State wanted the jury to use the screenshots to conclude Defendant communicated with DeJesus in violation of the DVPO through the Facebook comments. These are not being introduced simply to show DeJesus's Facebook posts had comments from her daughter's account because this would not show any communication by Defendant

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in violation of the DVPO. The evidence must show Defendant was responsible for the Facebook comments in order to show he communicated with DeJesus in violation of the DVPO. In light of this purpose, the Facebook comments also needed to be authenticated by evidence sufficient to support finding they were communications actually made by Defendant. N.C.G.S. § 8C-1, Rule 901(a) (2019).

“In order for a photograph to be introduced, it must first be properly authenticated by a witness with knowledge that the evidence is in fact what it purports to be.” *State v. Lee*, 335 N.C. 244, 270, 439 S.E.2d 547, 560 (1994). Here, the screenshots were properly authenticated as required for photographs. On direct examination of DeJesus, the following exchange occurred:

[THE STATE:] During this same time period, did you start to receive – do you have a Facebook page?

[DEJESUS:] I do have a Facebook.

[THE STATE:] And is that page something that has your name on it that identifies you?

[DEJESUS:] Yes.

[THE STATE:] Did you also start to receive comments left on posts that you made on Facebook?

[DEJESUS:] I did.

[THE STATE:] Your Honor, may I approach?

THE COURT: Yes.

(State’s Exhibits 4 - 6 marked for identification.)

[THE STATE:] Inez, I’m showing you what’s been previously marked for identification purposes as State’s Exhibit 4, 5 and 6. Will you take a look at those please and let me know if you recognize them.

[DEJESUS:] Yep. Yes, I do.

[THE STATE:] What are State’s Exhibit 4, 5 and 6?

[DEJESUS:] They’re my posts on – Facebook posts.

[THE STATE:] And what about State’s Exhibit 4, 5 and 6 – did you take screenshots?

[DEJESUS:] I did.

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[THE STATE:] Okay. Is that what these are?

[DEJESUS:] Yes.

[THE STATE:] And why did you specifically screenshot State's Exhibits 4, 5 and 6 from your Facebook page?

[DEFENDANT:] Your Honor, again, we would object to the questions and move to strike the testimony based on arguments previously made in court.

THE COURT: The objection's overruled.

[DEJESUS:] Because I know my daughter wouldn't write none of this stuff on my page. She never posts on my Facebook.

[THE STATE:] And we'll talk about that in one second, Inez. These are messages that –

[DEJESUS:] Yes.

[THE STATE:] – you received on Facebook?

[DEJESUS:] Yes.

[THE STATE:] Your Honor, at this time the State moves Exhibits 4, 5 and 6 into evidence.

[DEFENDANT:] Objection on the grounds previously stated.

THE COURT: The objection is overruled. Four, Five and Six are admitted.

As Defendant concedes, the above inquiry was sufficient to authenticate the screenshots of the Facebook comments as photographs. DeJesus testified she took the screenshots of the comments on her Facebook posts, which showed the screenshots were in fact what they purported to be. Since the screenshots of the Facebook comments were properly authenticated as photographs, we next determine if they were properly authenticated as written statements.

“Pursuant to Rule 901 of the North Carolina Rules of Evidence, every writing sought to be admitted must first be properly authenticated.” *Allen*, 258 N.C. App. at 288, 812 S.E.2d at 195 (quoting *State v. Ferguson*, 145 N.C. App. 302, 312, 549 S.E.2d 889, 896 (2001)). Our Supreme Court has stated “[i]t was not error for the trial court to admit the [evidence] if it could reasonably determine that there was sufficient evidence to

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support a finding that ‘the matter in question is what its proponent claims.’ ” *State v. Wiggins*, 334 N.C. 18, 34, 431 S.E.2d 755, 764 (1993) (quoting N.C.G.S. § 8C-1, Rule 901). According to Rule 901(b)(4), Rule 901(a) can be satisfied by “[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.” N.C.G.S. § 8C-1, Rule 901(b)(4) (2019). Furthermore, we have acknowledged “the authorship and genuineness of letters, typewritten or other, may be proved by circumstantial evidence[.]” *State v. Young*, 186 N.C. App. 343, 354, 651 S.E.2d 576, 583 (2007) (quoting *State v. Davis*, 203 N.C. 13, 28, 164 S.E. 737, 745, *cert. denied*, 287 U.S. 649, 77 L. Ed. 561 (1932)).

Applying Rule 901(b)(4) here, the Facebook comments were properly authenticated prior to admission as the distinctive characteristics of the post in conjunction with the circumstances are sufficient to conclude Defendant wrote the comments. As stated above, this evidence was introduced to show Defendant made a written statement to DeJesus in violation of the DVPO. Before State’s Exhibits 4, 5, and 6 were admitted, circumstantial evidence was presented that was sufficient to conclude Defendant had access to his daughter’s Facebook account allowing him to make the Facebook comments. This circumstantial evidence includes: Defendant and DeJesus’s daughter picked up Defendant from jail upon his release; their daughter has a strong relationship with Defendant and a “very rocky” one with DeJesus; DeJesus began to receive the Facebook comments a week or two after Defendant was released; and DeJesus took the screenshots of the Facebook comments because “[she knew her] daughter wouldn’t write none of this stuff on [her Facebook] page. [Her daughter] never posts on [her] Facebook.” The Facebook comments made from the daughter’s account, which were unlike her, in conjunction with Defendant’s recent interaction and close relationship with his daughter is circumstantial evidence sufficient to conclude Defendant had access to her Facebook account.

In conjunction with Defendant’s potential access to his daughter’s Facebook account, there was sufficient circumstantial evidence to conclude the person who posted these comments from the daughter’s Facebook account was Defendant. This circumstantial evidence includes: Defendant had ignored a DVPO before by calling DeJesus and sending her letters from jail in 2013 and 2015⁴; a week or two after

4. This evidence was limited at trial in the following instruction: “Evidence has been received tending to show that despite an existing domestic violence protective order, [D]efendant attempted to make telephone contact and communicate by letter with Ms. DeJesus in 2013 and 2015. This evidence was received solely for the purpose of showing:

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Defendant's release, on 5 July 2017 until 11 July 2017, DeJesus received phone calls and voicemails from a blocked number to the same phone number DeJesus had used since 2011; these voicemails had Defendant's voice and one referred to an event that took place with Defendant and DeJesus, one was just breathing, and one was threatening; DeJesus had a Facebook page in her name and in the same week-long period she also started to receive comments on her posts, which were shown in State's Exhibits 4, 5, and 6; and these were screenshots she took of her posts because "[she knew her] daughter wouldn't write none of this stuff on [her] page. [Her daughter] never posts on [her] Facebook." The above circumstantial evidence, in conjunction with the circumstantial evidence of Defendant's access to the daughter's Facebook account, was sufficient to find Defendant posted the Facebook comments because Defendant had access to the Facebook account to make the comments, and the Facebook comments were not made by the daughter but were made in the same timeframe as the phone calls Defendant made to DeJesus.

According to *Young*, the circumstantial evidence here is appropriate to authenticate the Facebook comments as there was circumstantial evidence that was sufficient to find the Facebook comments were written by Defendant. Additionally,

[o]nce evidence from which the jury could find that the writing is genuine has been introduced, the writing becomes admissible. Upon the admission of the writing into evidence, it is solely for the jury to determine the credibility of the evidence both with regard to the authenticity of the writing and the credibility of the writing itself.

Young, 186 N.C. App. at 354, 651 S.E.2d at 583 (quoting *Milner Hotels, Inc. v. Mecklenburg Hotel, Inc.*, 42 N.C. App. 179, 180-81, 256 S.E.2d 310, 311 (1979)). The evidence was sufficient to support the trial court's authentication and admission of the Facebook comments, and upon admission it was for the jury to decide the authenticity and credibility of the writing. *Id.*

The identity of the person who committed the crime charged in this case, if it was committed; That [D]efendant had a motive for the commission of the crime charged in this case; That [D]efendant had knowledge, which is a necessary element of the crime charged in this case; The absence of a mistake. If you believe this evidence, you may consider it, but only for the limited purpose for which it was received. You may not consider it for any other purpose." Our use of the prior violation of a DVPO here is permissible since it is used to show knowledge of the phone number.

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CONCLUSION

The trial court reasonably determined there was sufficient evidence to conclude the Facebook comments were made by Defendant. It was proper for the jury to determine whether the evidence supported a violation of the DVPO.

NO ERROR.

Judges BRYANT and BERGER concur in result only.

STATE OF NORTH CAROLINA
v.
AJALON DERICE DOVE

No. COA20-143

Filed 1 December 2020

1. Criminal Law—jury instructions—acting in concert—supported by the evidence

In a case involving first-degree felony murder, the trial court did not err—much less commit plain error—by instructing the jury on the doctrine of acting in concert where the evidence showed defendant and another man were instructed by defendant’s brother to collect a drug debt, the two men drove to a parking lot near the house where the victim was on the back porch, the men were captured on video walking to the house, defendant entered the house and gunshots were fired, the two men ran to the car, and the other man drove defendant from the scene.

2. Evidence—witness testimony—lack of first-hand knowledge—prejudice analysis

The trial court erred in a first-degree felony murder trial by allowing a lay witness to testify that she believed defendant was holding a gun in a surveillance video where her opinion was based on her viewing of the video and not based on first-hand knowledge or perception, and she was in no better position than the jury to determine if defendant was holding a gun. However, the error was not prejudicial because there was substantial other evidence of defendant’s guilt, and the prosecutor only asked the witness once about what the defendant was holding in the video.

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[274 N.C. App. 417 (2020)]

Appeal by defendant from judgments entered 29 July 2019 by Judge Imelda J. Pate in Wayne County Superior Court. Heard in the Court of Appeals 22 September 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Marilyn G. Ozer for defendant-appellant.

ZACHARY, Judge.

Sammy Evans was visiting a friend when he was fatally wounded by gunfire. A police investigation into Evans's death led to the arrest of Defendant Aijalon Derice Dove, who was convicted of first-degree felony murder, possession of a firearm by a felon, discharging a weapon into occupied property, and felonious possession of cocaine.

On appeal, Defendant argues that the trial court (1) plainly erred by instructing the jury on the doctrine of acting in concert, and (2) erred by admitting lay opinion testimony that usurped the role of the jury. After careful review, we conclude that Defendant received a fair trial, free from prejudicial error.

Background

On 19 July 2019, Defendant's case came on for jury trial in Wayne County Superior Court, the Honorable Imelda J. Pate presiding. The State's evidence tended to show that on the evening of 21 November 2017, Sammy Evans was visiting the home of a friend, Renee Thompson, and the two of them were doing laundry. The washer and dryer were located on the enclosed back porch. While Thompson went to fold clothes in the bedroom, Evans stepped out back to smoke some marijuana.

Shortly after going into the bedroom, Thompson heard six gunshots, fired in quick succession, and Thompson and her other visitors took cover. When the shooting stopped, Thompson and her daughter found Evans lying in a pool of blood on the enclosed back porch, and Thompson called 911. The house, some property inside the house, and Thompson's daughter's van were damaged by the gunfire.

Law enforcement officers and EMS responded to the call. EMTs pronounced Evans dead at the scene. Law enforcement officers found seven shell casings along the edge of the property, and spent projectiles inside the van and the washing machine. Surveillance cameras captured Defendant near the scene of the crime with his friend, Octavious,

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and showed the license plate number of Defendant's car. Footage also showed Defendant carrying a gun.¹ Later that morning, after finding Defendant's vehicle at the Econo Lodge Inn, law enforcement officers executed a search warrant for Defendant's hotel room, where they discovered a loaded gun and some cocaine. A forensic scientist in the firearms unit of the North Carolina State Crime Laboratory testified that his examination of the cartridge cases found at Thompson's house revealed that they were from 9mm Luger bullets, which were fired from the gun found in Defendant's hotel room.

Defendant's evidence painted an entirely different picture. He testified that he and Octavious left Bob's No. 2, a local game room and convenience store, to visit Octavious' grandmother at Thompson's house on North Herman Street. Octavious drove Defendant's mother's car, and parked in the Piggly Wiggly parking lot. From there, the men walked toward Thompson's house. As they were walking, Defendant stopped to urinate in the bushes while Octavious went on without him. When Defendant heard gunshots, he ran back to the car. Octavious ran back to the car as well, and they returned to Bob's No. 2. Defendant eventually left to meet his girlfriend at the Econo Lodge Inn. While he was at the Econo Lodge, Octavious telephoned Defendant, and Defendant retrieved the gun from the car. However, Defendant testified that he did not know there was a gun in the car prior to the call from Octavious, and that he did not know Evans.

Octavious' testimony conflicted with Defendant's.² Octavious testified that Evans owed money to Defendant's brother, and that he and Defendant went to get the money from Evans. Octavious drove Defendant's car to the Piggly Wiggly parking lot, and the two men walked to Thompson's house. Octavious said that Defendant did not stop to urinate in the bushes. Instead, because Octavious was not allowed in Thompson's house, he waited at the neighbor's while Defendant went to collect the money from Evans. Shortly after Defendant left Thompson's house, Octavious heard gunfire and saw Defendant run past him. Octavious followed Defendant to the car, and Octavious then drove them back to Bob's No. 2. Octavious further testified that he did not call Defendant that evening; that neither he nor Defendant had a gun; and that Octavious did not check on his aunt and grandmother afterward.

1. On appeal, Defendant challenges the admissibility of this evidence.

2. At the time of Defendant's trial, Octavious was also charged with the first-degree murder of Evans.

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The jury found Defendant guilty of first-degree murder under the theory of felony murder, possession of a firearm by a felon, discharging a weapon into occupied property, and felonious possession of cocaine. For the offense of first-degree felony murder, the trial court sentenced Defendant to life imprisonment without parole in the North Carolina Division of Adult Correction. The trial court arrested judgment on the charge of discharging a firearm into occupied property, as the underlying felony supporting the conviction for felony murder. For the offenses of possession of a firearm by a felon and felony possession of cocaine, the trial court sentenced Defendant to 19-32 months' imprisonment set to begin at the expiration of his sentence for first-degree murder.

Defendant gave notice of appeal in open court.

Discussion

On appeal, Defendant argues that the trial court (1) “committed plain error by instructing the jury [that] [D]efendant could be found guilty of the murder and shooting into an occupied dwelling based on the theory of acting in concert”; and (2) “erred by allowing a witness to testify to her opinion on an issue [of] which she had no personal understanding and that was properly in the province of the jury.” We address each argument in turn.

I. Jury Instructions

[1] Defendant first contends that the trial court plainly erred by instructing the jury on the theory of acting in concert, in that the evidence offered at trial did not support this instruction.

“In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C.R. App. P. 10(a)(4). Thus, because “[D]efendant failed to object to the jury instruction at trial, he must show plain error by establishing that the trial court committed error, and that absent that error, the jury probably would have reached a different result.” *State v. Poag*, 159 N.C. App. 312, 321-22, 583 S.E.2d 661, 668, *disc. review denied*, 357 N.C. 661, 590 S.E.2d 857 (2003).

It is axiomatic that in order to constitute plain error justifying a new trial, the error must “be so fundamental that [the] defendant, in light of the evidence, the issues and the instructional error, could not have received a fair trial.” *State v. Abraham*, 338 N.C. 315, 345, 451 S.E.2d 131, 147 (1994). “[A] defendant must establish prejudice—that, after

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examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and internal quotation marks omitted). "It is generally prejudicial error for the trial court to instruct the jury on a theory of [the] defendant's guilt that is not supported by the evidence." *Poag*, 159 N.C. App. at 322, 583 S.E.2d at 668.

Under the doctrine of acting in concert, "[a] person may be found guilty of committing a crime if he is at the scene acting together with another person with a common plan to commit the crime, although the other person does all the acts necessary to commit the crime." *State v. Jefferies*, 333 N.C. 501, 512, 428 S.E.2d 150, 156 (1993); *accord State v. Joyner*, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979) ("To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose."). As our Supreme Court has explained, "[i]t is not . . . necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle[.]" *Joyner*, 297 N.C. at 357, 255 S.E.2d at 395.

In the instant case, there was sufficient evidence to support the State's theory that Defendant was guilty by acting in concert with Octavious, and to justify instructing the jury on the doctrine of acting in concert. The evidence at trial tended to show that Defendant, Defendant's brother, and Octavious met up at Bob's No. 2, a local game room and convenience store. Defendant and Octavious were identified together there in the surveillance video footage, and Defendant was pictured holding a gun. After Octavious and Defendant's brother discussed the fact that Evans owed money to Defendant's brother, Defendant's brother instructed Octavious and Defendant to collect the money. Evans was visiting the home of Octavious' aunt, Renee Thompson, on North Herman Street, and Evans's Cadillac was parked in the driveway. Rather than drive all the way to Thompson's home, Octavious parked Defendant's car in the parking lot of the Piggly Wiggly near her home, and the men walked from there. Defendant and Octavious were identified together in surveillance video footage from the Piggly Wiggly and in surveillance video footage from North Herman Street. When they arrived, Defendant entered Thompson's house alone, because Octavious was not allowed in the house.

After gunshots were fired, the men ran to the car, and Octavious drove Defendant to Bob's No. 2. Defendant and Octavious were identified together, fleeing the scene, on two surveillance videos. The gun that fired the bullet that killed Evans—which contained live rounds at the

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time it was discovered by police—was found in Defendant’s hotel room hours after the shooting.

Taken together, and in light of the “heavy burden of plain error analysis” that a defendant is required to shoulder, *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001), we conclude that the evidence sufficiently supports the conclusion that Defendant acted in concert with Octavious in committing the charged offenses. Thus, the trial court did not err, much less plainly err, by instructing the jury on the doctrine of acting in concert. This argument lacks merit.

II. Evidentiary Rule 602

[2] Defendant next argues that the trial court erred in allowing Octavious’s aunt, Renee Thompson, to testify that she believed that Defendant was holding a gun in his hand in video footage from a surveillance camera at Bob’s No. 2 and from screen shots produced from that footage.

“[W]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion.” *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). “A trial court abuses its discretion if the ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Weldon*, 258 N.C. App. 150, 154, 811 S.E.2d 683, 687 (2018) (citation and internal quotation marks omitted). However, even if the trial court erred by allowing such testimony, the defendant must show that the error was prejudicial. *See* N.C. Gen. Stat. § 15A-1443(a); *State v. Buie*, 194 N.C. App. 725, 733, 671 S.E.2d 351, 356, *disc. review denied*, 363 N.C. 375, 679 S.E.2d 135 (2009).

It is well established that “the jury is charged with determining what inferences and conclusions are warranted by the evidence.” *Buie*, 194 N.C. App. at 730, 671 S.E.2d at 354. “Ordinarily, opinion evidence of a non-expert witness is inadmissible because it tends to invade the province of the jury.” *State v. Fulton*, 299 N.C. 491, 494, 263 S.E.2d 608, 610 (1980). However, Rule 701 permits a lay opinion witness to offer “opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C. Gen. Stat. § 8C-1, Rule 701.

Relatedly, Rule 602 provides that “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal

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knowledge may, but need not, consist of the testimony of the witness himself.” *Id.* § 8C-1, Rule 602. “The Commentary to Rule 602 further provides that the foundation requirements may, of course, be furnished by the testimony of the witness h[er]self; hence personal knowledge is not an absolute but may consist of what the witness thinks [s]he knows from personal perception.” *State v. Harshaw*, 138 N.C. App. 657, 661, 532 S.E.2d 224, 227 (internal quotation marks omitted), *disc. review denied*, 352 N.C. 594, 544 S.E.2d 793 (2000).

Defendant contends that Thompson’s “opinion of what can be seen in a video is inadmissible as she was in no better position to know what the video showed than the jurors,” and that “[t]here is a reasonable possibility that if the trial court had granted Defendant’s motion to strike [Thompson’s] opinion testimony a different result would have been reached at trial.”³

It is undisputed that Thompson’s testimony that Defendant was holding a gun at Bob’s No. 2 on the evening of Evans’s death was not based on Thompson’s firsthand knowledge or perception, but rather solely on her viewing of surveillance video footage and screen shots extracted from the video footage. Thompson was not at the scene, and instead relied upon the same footage shown to the jury. Indeed, Thompson was clearly in no better position to correctly determine what Defendant was holding in his hand than the jury. *See State v. Belk*, 201 N.C. App. 412, 418, 689 S.E.2d 439, 443 (2009), *disc. review denied*, 364 N.C. 129, 695 S.E.2d 761 (2010). Thus, the admission of Thompson’s testimony was error.

Nonetheless, Defendant must demonstrate that he was prejudiced by this error by showing that “there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]” N.C. Gen. Stat. § 15A-1443(a). After careful review, we conclude that Defendant has not satisfied this burden.

In the instant case, there was substantial other evidence on which the jury could base a finding of Defendant’s guilt. Octavious testified

3. The State notes that “Defendant did not specify the basis of his objection at trial,” without further analysis or argument. While a party seeking to preserve an issue for appellate review “must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make,” N.C.R. App. P. 10(a)(1), stating the specific grounds for the objection is necessary only “if the specific grounds were not apparent from the context.” *Id.* Having reviewed Thompson’s testimony and the prosecutor’s line of questioning, we are satisfied that the objection to Thompson’s testimony was “apparent from the context.” *See State v. Phillips*, ___ N.C. App. ___, ___, 836 S.E.2d 866, 873 (2019).

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that Evans owed money to Defendant's brother, and that Defendant's brother instructed them to collect on the debt just before they left Bob's No. 2. The State effectively traced Defendant's trek with Octavious from Bob's No. 2 to Thompson's home, his arrival at the scene just before the shooting, and his quick return to Bob's No. 2. The jurors also viewed the surveillance videos and screen shots in which Defendant and Octavious were identified together at Bob's No. 2 and along roads leading to Thompson's home, as well as the expended cartridge casings that officers found bordering the edge of Thompson's property. A forensics expert testified that these casings were fired from the gun discovered in Defendant's hotel room. Moreover, Thompson's challenged testimony was minimal and brief. The prosecutor did not linger on this issue, only asking Thompson once what Defendant was holding.

In sum, even if the jurors credited Thompson's testimony on this point, we are not convinced that there is a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]" N.C. Gen. Stat. § 15A-1443(a). Accordingly, this final argument must fail.

Conclusion

Defendant failed to show that the trial court plainly erred by instructing the jury on the doctrine of acting in concert, and failed to demonstrate that he was prejudiced by the trial court's admission of Thompson's testimony.

NO ERROR.

Chief Judge McGEE and Judge ARROWOOD concur.

STATE v. GAMBLE

[274 N.C. App. 425 (2020)]

STATE OF NORTH CAROLINA

v.

SHELLEY LOVETTE GAMBLE

No. COA20-83

Filed 1 December 2020

Sentencing—felony embezzlement—aggravating factor—taking of property of great monetary value—ratio of amount embezzled to threshold amount of offense

In a case where defendant was convicted of eight counts of embezzlement of property received by virtue of office or employment, the trial court did not err by applying the aggravating factor of “taking of property of great monetary value” when it sentenced defendant for one of the convictions—a conviction for Class C felony embezzlement of more than \$100,000. Defendant’s conviction on that charge was based on her embezzlement of \$202,242.62, and the ratio between the amount embezzled and the statutory threshold, as well as the total amount of money embezzled, supported application of the aggravating factor.

Appeal by Defendant from judgment entered 25 July 2019 by Judge Michael D. Duncan in Wilkes County Superior Court. Heard in the Court of Appeals 17 November 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Teresa L. Townsend, for the State.

Patterson Harkavy LLP, by Narendra K. Ghosh, for Defendant.

COLLINS, Judge.

Defendant challenges her sentence following conviction of eight counts of embezzlement of property received by virtue of office or employment. She argues that the trial court erred by applying the aggravating factor of “taking of property of great monetary value,” N.C. Gen. Stat. § 15A-1340.16(d)(14), to one of her convictions because the value embezzled, \$202,242.62, was not far greater than the \$100,000 threshold amount required to support a conviction of Class C felony embezzlement under N.C. Gen. Stat. § 14-90(c). We discern no error.

STATE v. GAMBLE

[274 N.C. App. 425 (2020)]

I. Factual Background and Procedural History

Brushy Mountain Group Homes is a nonprofit which runs three group homes in Wilkes County for adults with intellectual disabilities. Brushy Mountain first hired Defendant as a manager in 1989. Defendant subsequently became Brushy Mountain's executive director in July 2001.

In July 2016, Defendant informed Brushy Mountain's Board of Directors that the nonprofit was out of funds. Between June 2012 and July 2016, the balance in Brushy Mountain's various accounts had fallen from over \$400,000 to \$440. Concerned, the Board of Directors forwarded Brushy Mountain's financial records to its attorney, and then to the State Bureau of Investigation ("SBI"). An SBI investigation revealed \$410,203.41 in unauthorized expenditures. These expenditures included 373 checks totaling \$26,251.81 in 2014, \$202,242.62 in 2015, and \$168,240.00 in 2016, as well as \$13,468.98 in credit card charges spanning 2012 to 2016. All of the checks were deposited into Defendant's checking account or endorsed by Defendant. Defendant resigned her position as executive director in August 2016.

On 4 September 2018, Defendant was indicted on eight counts of embezzlement of property received by virtue of office or employment, pursuant to N.C. Gen Stat. § 14-90; two of the counts alleged Defendant embezzled property valued \$100,000 or more. Each individual indictment corresponded to the sum of one particular year's unauthorized checks or credit card transactions. Defendant was tried before a jury in Wilkes County Superior Court from 22 to 25 July 2019. The jury found Defendant guilty of all charges.

At sentencing, Defendant pled guilty to the aggravating factor that one of the offenses involving unauthorized credit card transactions and all three offenses involving unauthorized checks "involved an . . . actual taking of property of great monetary value." *See* N.C. Gen. Stat. § 15A-1340.16(d)(14) (2019). The trial court applied the aggravating factor to Defendant's conviction of embezzlement of \$202,242.62 in 2015, and sentenced Defendant to 92 to 123 months' imprisonment.¹ The trial court consolidated the remaining convictions and imposed sentences within the presumptive range, suspended for 60 months of supervised probation. Additionally, the trial court ordered Defendant to pay \$25,000 in restitution. Defendant gave notice of appeal in open court.

1. While the trial court consolidated Defendant's convictions for the 2015 and 2016 checks for the purposes of sentencing, it only applied the aggravating factor on the basis of the \$202,242.62 Defendant was convicted of embezzling in 2015.

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II. Discussion

Defendant's sole argument on appeal is that the trial court erred by imposing a sentence in the aggravated range. Specifically, Defendant contends that the "great monetary value" aggravating factor cannot be applied because the value embezzled, \$202,242.62, was not far greater than the \$100,000 amount required to support a conviction of Class C felony embezzlement under N.C. Gen. Stat. § 14-90(c). Alleged statutory sentencing errors are questions of law which we review de novo. *State v. Allen*, 249 N.C. App. 376, 379, 790 S.E.2d 588, 591 (2016).

When sentencing a criminal defendant, the trial court must consider "evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate" N.C. Gen. Stat. § 15A-1340.16(a) (2019). A "defendant may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury" *Id.* § 15A-1340.16(a1) (2019).

"Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation" *Id.* § 15A-1340.16(d) (2019). The aggravating factor at issue in this case is whether "[t]he offense involved an attempted or actual taking of property of great monetary value" *Id.* § 15A-1340.16(d)(14). One of the elements of Class C felony embezzlement of property received by virtue of office or employment is that the value of the property taken was \$100,000 or more. *Id.* § 14-90(c) (2019).

Though a conviction for Class C felony embezzlement requires evidence of this threshold value, a trial court may still be permitted to apply the "great monetary value" aggravating factor when sentencing a defendant for the offense. *See State v. Cobb*, 187 N.C. App. 295, 297, 652 S.E.2d 699, 700 (2007) (permitting application of the "great monetary value" aggravating factor where the defendant pled guilty to three counts of Class C felony embezzlement). The trial court's ability to do so is not subject to a

rigid test based upon a ratio of the amount embezzled to the threshold amount of the offense. Rather, the ratio is a factor to be considered along with the total amount of money actually taken in deciding whether it is appropriate to find this aggravating factor.

Id. at 298, 652 S.E.2d at 701.

For example, in *Cobb*, the defendant pled guilty to three counts of Class C felony embezzlement under N.C. Gen. Stat. § 14-90(c). *Id.* at 296-97, 652 S.E.2d at 700. At sentencing, the trial court applied the "great

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monetary value” aggravating factor to the counts involving embezzlement of \$404,436 and \$296,901. *Id.* at 297, 652 S.E.2d at 700. This Court held that the trial court did not err because these “were sums of ‘great monetary value’ when compared with the threshold amount required for the offense of \$100,000.00.” *Id.* at 298, 652 S.E.2d at 701.

In the context of Class H felony larceny under N.C. Gen. Stat. § 14-72(a)—an offense which requires a threshold value of more than \$1,000—this Court has held that values between \$2,500 and \$3,000 are sufficient to support application of the “great monetary value” aggravating factor. *State v. Pender*, 176 N.C. App. 688, 694-95, 627 S.E.2d 343, 347-48 (2006); *State v. Simmons*, 65 N.C. App. 804, 806, 310 S.E.2d 139, 141 (1984). Additionally, “there is no bar that prevents this Court from holding that a great monetary amount” for the purpose of a Class H felony larceny conviction “may include an amount less than [\$2,500].” *Pender*, 176 N.C. App. at 695, 627 S.E.2d at 348.

Here, both the ratio between the amount embezzled and the statutory threshold, as well as the total amount of money embezzled, support the application of the “great monetary value” aggravating factor. Defendant was convicted of embezzling \$202,242.62 in 2015, more than two times greater than the applicable \$100,000 threshold. *See* N.C. Gen. Stat. § 14-90(c). Defendant’s argument that “[t]his Court has never approved use of the ‘great monetary amount’ aggravator where the ratio of the amount taken and the offense’s threshold amount was less than 2.5” disregards our disavowal of any rigid test based upon a fixed ratio. *Cobb*, 187 N.C. App. at 298, 652 S.E.2d at 701.

Additionally, \$202,242.64 is, from the standpoint of an ordinary person, a great value of money. Defendant’s assertion that “the amount at issue here is only somewhat above the \$100,000 threshold” is not credible. Defendant’s argument that the trial court erred by applying the “great monetary value” aggravating factor when sentencing her is overruled.

III. Conclusion

Because Defendant was convicted of embezzling \$102,242.62 in excess of the \$100,000 threshold required for a conviction of Class C felony embezzlement under N.C. Gen. Stat. § 14-90(c), the trial court did not err by applying the aggravating factor of “taking of property of great monetary value” when sentencing Defendant.

NO ERROR.

Judges DIETZ and ZACHARY concur.

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[274 N.C. App. 429 (2020)]

STATE OF NORTH CAROLINA

v.

ADELL GRADY

No. COA19-1025

Filed 1 December 2020

1. Evidence—other crimes, wrongs, or acts—uncharged similar crime—Rules 403 and 404(b)—chain of events—no unfair prejudice

In a prosecution for felony breaking and entering and felony larceny, there was no error in the admission of evidence regarding an uncharged breaking and entering that occurred on the same morning and one street over from the crimes for which defendant was on trial. The evidence was admissible under Evidence Rule 404(b) because it was not admitted solely to show defendant's propensity to commit the charged offenses, but depicted a chain of events that tended to show the same person committed the two break-ins in close temporal and spatial proximity. Moreover, the evidence was not unfairly prejudicial and therefore did not have to be excluded pursuant to Evidence Rule 403.

2. Evidence—hearsay—statements from neighbor regarding second break-in—present sense impression exception

In a prosecution for felony breaking and entering and felony larceny, the trial court did not err by admitting statements made by a nearby resident—whose house had also been broken into on the same morning and one street over from the break-in that gave rise to the charged offenses—to law enforcement because the statements qualified under the present sense impression exception to the hearsay rule (Evidence Rule 803(1)). The statements were made within minutes after the resident was aware that his house had been broken into, and the resident made the statements in an agitated and angry manner.

3. Firearms and Other Weapons—possession of firearm—sufficiency of evidence—circumstantial evidence

In a prosecution for felony breaking and entering and felony larceny, the trial court properly denied defendant's motion to dismiss a charge of possession of a firearm by a felon where there was sufficient evidence, albeit circumstantial, that defendant possessed a bag holding three guns that were taken during a house break-in.

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Surveillance video near the house showed an empty-handed man (later identified as defendant) approaching the house and then, shortly afterward, leaving with a bag that had items sticking out of it; soon after that, law enforcement met the owner at the house, and the owner discovered his three guns were missing.

Appeal by defendant from judgments entered 7 March 2019 by Judge John E. Nobles Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 8 September 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Colleen M. Crowley, for the State.

Dunn, Pittman, Skinner & Cushman, PLLC, by Rudolph A. Ashton, III, for defendant.

DIETZ, Judge.

Defendant Adell Grady appeals his convictions for felony breaking and entering, felony larceny, and possession of a firearm by a felon. He argues that the trial court erred by admitting the State's evidence that he committed another similar breaking and entering. Grady also argues that an officer's testimony about that other break-in involved inadmissible hearsay. Finally, Grady argues that there was insufficient evidence that he stole any guns during the break-in and thus the charge of possession of a firearm by a felon should have been dismissed.

We reject these arguments. The evidence of the other break-in, which took place on a neighboring street, at around the same time, on the same day, by someone with the same general features and dressed in the same clothes as the perpetrator of the charged offenses, was properly admitted under Rule 404(b) for various reasons other than solely to show Grady's propensity to commit those offenses.

Likewise, the officer's description of what the victim of that other break-in told him, just minutes after that break-in occurred, was admissible as a present sense impression. Finally, the State's evidence was sufficient to overcome a motion to dismiss the charge of possession of a firearm by a felon, even without any direct evidence that Grady stole the guns, based on the evidence that those guns were present in a locked house before the break-in, that they were missing afterward, and that Grady was the perpetrator of the break-in. We therefore find no error in the trial court's judgments.

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Facts and Procedural History

In 2018, Officer Jesse Moore with the Wilmington Police Department responded to a report of a breaking and entering at a home on Fowler Street. When Moore arrived, he observed that the front door was kicked in. The resident of the home, Jason Gray, was not there.

Gray's next-door neighbors, the Overbys, had called 911. They were waiting outside for police to arrive. Ms. Overby reported that her husband had been across the street feeding a neighbor's dog that morning when she heard a loud noise, looked outside, and saw a man walk across the corner of their driveway from the direction of Gray's house, and then walk east on Fowler Street toward a nearby apartment complex. Ms. Overby described the man as African-American, wearing a red and black hoodie, and carrying a Game Stop bag. Shortly after, Ms. Overby saw a gold car drive by several times making a loud noise.

As Mr. Overby was walking back from the neighbor's house, the gold car, a Dodge Neon, stopped in front of the Overbys' house. The driver asked Mr. Overby for directions. Mr. Overby described the driver as a black man with grayish hair and beard, probably in his 40s or 50s, and wearing a red and black hoodie. After the man drove off, Mr. Overby went to check on Gray's house, saw that the front door was kicked open, and told Ms. Overby to call the police.

Ms. Overby later checked their security system video footage, where she again saw the man with the red and black hoodie. The video captured the man walking next door toward Gray's home with nothing in his hands and then coming out across the front of the Overbys' house with a Game Stop bag in his hands. The Overbys testified that they couldn't see what was in the bag, but "you could tell by looking at it, it was kind of – stuck out on different sides or whatever and you could tell there was weight in the bag." The Overbys provided their surveillance footage to Officer Moore. Ms. Overby also viewed footage showing the man walking to the gold car parked at the nearby apartment complex, getting in the car, and driving towards the Overbys' home. The Overbys were unable to provide that portion of the footage to police due to a system malfunction.

After Officer Moore notified Jason Gray, the home's resident, of the break-in, Gray returned home to find that his front door was broken open, the house had been ransacked, and many of his belongings were missing. The missing items included multiple electronic devices, video games and gaming consoles, and three firearms (two handguns and a shotgun). Gray testified that he had Game Stop bags in his residence at the time of the break-in.

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On the same morning as the Fowler Street break-in, Officer William Rose investigated a breaking and entering at a house on Dexter Street, one street over from Fowler Street. Officer Rose arrived shortly before 10:20 a.m. As Officer Rose was approaching the Dexter Street house, the home's resident, James Smith, arrived and ran towards the backyard. Officer Rose followed him. Smith identified himself as the resident of the home and as "the person who had called 911 because of the house being broken into." Smith was "agitated," "excited," and "angry" and told Officer Rose that his house had just been broken into.

Smith showed Officer Rose a portion of a video that was automatically sent to his cell phone from his home's security camera, showing that there was someone inside the residence. The time stamp on the video was 10:17 a.m. After waiting for other officers to arrive, Officer Rose entered the residence. There was property damage to the rear door frame of the residence where the surveillance video showed the suspect had entered. Officer Rose then asked Smith if anything was missing from the residence, and Smith told the officer that a television was missing.

Sergeant Brian Needham later reviewed security video footage from both Fowler Street and Dexter Street. Both videos showed a black man wearing a red and black hooded sweatshirt. The man could be seen entering the home on Dexter Street and carrying away a television. Upon comparing the videos, Sergeant Needham concluded that the same individual committed both the Dexter Street and Fowler Street break-ins. After locating the gold Dodge Neon from the Fowler Street surveillance footage and identifying its owner, Needham went on Facebook where he found a photo of the car's owner with a man who closely resembled the description given by the Overbys and the man in the security videos. Needham identified the man as Defendant Adell Grady and found a Facebook photo from the previous month showing Grady wearing a red and black hooded sweatshirt that was the same style of sweatshirt worn by the suspect in the surveillance videos.

Police then located Grady and arrested him. At the time of his arrest, Grady was wearing what officers believed to be the same red and black Nike hooded sweatshirt shown in the surveillance videos. Grady was charged with breaking and entering, larceny, and possession of a firearm by a felon in connection with the Fowler Street break-in.

Corporal Carlos Lamberty and Detective Robert Ferencak interviewed Grady after his arrest and showed him still shots from the surveillance videos of the break-ins. Grady then admitted to his direct involvement in the Dexter Street break-in and admitted to his presence on Fowler Street around the time of that break-in. He implicated a man

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named Cedric Age as the perpetrator of the break-ins. Grady admitted to driving the gold Dodge Neon in the Fowler Street video and to being in the house on Dexter Street. He also admitted to knowing about the television taken from the Dexter Street house, which he believed was later sold for drugs. But Grady denied breaking into the Fowler Street house and said he had nothing to do with the missing guns.

On 11 June 2018, Grady was indicted for felony breaking and entering, felony larceny, injury to real property, possession of a firearm by a felon, and attaining habitual felon status, all in connection with the Fowler Street break-in. The State did not move forward with any charges related to the Dexter Street break-in because James Smith, the home's resident, later refused to cooperate with the prosecution.

On 4 March 2019, the case went to trial. Following a *voir dire* with the law enforcement officers involved, the trial court admitted the State's evidence regarding the uncharged Dexter Street break-in under Rule 404(b) over Grady's repeated objections. Officers Rose, Needham, Lamberty, and Ferencak testified to the details of their investigation as described above. The trial court admitted Officer Rose's testimony about Smith's statements to him at the scene of the Dexter Street break-in, overruling Grady's hearsay objection. At the close of evidence, Grady moved to dismiss the charges and the trial court denied the motion.

On 7 March 2019, the jury convicted Grady of felony breaking and entering, felony larceny, and possession of a firearm by a felon. Grady then admitted his status as a habitual felon and also pleaded guilty to unrelated breaking and entering and larceny charges. The trial court sentenced Grady as a habitual felon to 111 to 146 months in prison plus restitution of \$4,854.96 for breaking and entering, and concurrent sentences of 111 to 146 months for larceny and 120 to 156 months for possession of firearm by a felon. Grady also received a concurrent sentence of 12 to 24 months on the charges to which he pleaded guilty. Grady appealed.

Analysis**I. Admission of Rule 404(b) evidence of Dexter Street break-in**

[1] Grady first argues that the trial court erred by admitting the State's Rule 404(b) evidence of the uncharged breaking and entering and larceny that occurred on Dexter Street on the same morning as the Fowler Street break-in at issue in this case. Grady contends that the evidence was inadmissible under Rule 404(b) because it merely "showed a

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propensity for him to commit the crime” and, even if it was admissible under Rule 404(b), it should have been excluded under Rule 403 because its probative value was outweighed by the risk of unfair prejudice. We reject this argument.

This Court reviews the legal conclusion that evidence is, or is not, within the coverage of Rule 404(b) *de novo*. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). We review the trial court’s corresponding Rule 403 determination for abuse of discretion. *Id.* “A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.” *State v. Cagle*, 346 N.C. 497, 506–07, 488 S.E.2d 535, 542 (1997).

Under Rule 404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.” N.C. R. Evid. 404(b). Our Supreme Court has made clear that Rule 404(b) is a “general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.” *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990). Thus, evidence of another offense “is admissible so long as it is relevant to any fact or issue other than the character of the accused.” *Id.* at 278, 389 S.E.2d at 54 (emphasis omitted).

Still, there are limits to the use of Rule 404(b) evidence. The “rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity.” *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002). These requirements can be satisfied where a defendant’s prior wrongful acts were “part of the chain of events explaining the motive, preparation, planning, and commission of the crime.” *State v. Parker*, 140 N.C. App. 169, 173, 539 S.E.2d 656, 660 (2000). “When the incidents are offered for a proper purpose, the ultimate test of admissibility is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test” in Rule 403. *State v. Pruitt*, 94 N.C. App. 261, 266, 380 S.E.2d 383, 385 (1989).

We begin by examining whether the challenged evidence was admitted solely to show Grady had a propensity to commit the charged

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offenses. It was not. The evidence of the Dexter Street break-in was offered for proper Rule 404(b) purposes. *Coffey*, 326 N.C. at 278–79, 389 S.E.2d at 54; N.C. R. Evid. 404(b). Specifically, there was evidence of a break-in on Fowler Street. There also was evidence that a person in a red and black hoodie walked toward the Fowler Street residence around the time of the break-in and later walked away from it carrying a bag. But there was no direct evidence that this person in a red and black hoodie committed the Fowler Street break-in.

Thus, an important part of the State’s case was presenting circumstantial evidence that this person in the red and black hoodie committed the crime. One permissible way to establish this fact was through evidence that a person matching that same description broke into a residence just one street over that same morning and stole a television.

This evidence was not used to show that the person in that red and black hoodie was Grady or that Grady was the type of person who breaks into people’s homes. Rather, it showed that the same person likely committed both crimes because there were two similar break-ins that took place on neighboring streets, at around the same time, on the same day, by someone with the same general features, dressed in the same clothes. This evidence was a natural account of a chain of similar break-ins that occurred that day and was used to establish that the person observed by witnesses and security cameras on Fowler Street committed the break-in. It was therefore admissible under Rule 404(b). *Parker*, 140 N.C. App. at 173–74, 539 S.E.2d at 660.

We next consider whether the trial court abused its discretion by determining that the probative value of this evidence was not substantially outweighed by any prejudicial effect under Rule 403. *Pruitt*, 94 N.C. App. at 266, 380 S.E.2d at 385. In his appellate brief, Grady argues that this evidence was “overwhelmingly prejudicial to his defense” without explaining why.

To be fair, this evidence certainly was prejudicial to Grady’s defense in the sense that it was quite incriminating, but all evidence “which is probative in the State’s case will have a prejudicial effect on the defendant.” *Cagle*, 346 N.C. at 506, 488 S.E.2d at 542. Rule 403 addresses *unfair* prejudice. *Id.* We see nothing in this evidence that makes it so unfairly prejudicial that the trial court’s decision to admit it was manifestly arbitrary and lacking in reason. *Id.* at 506–07, 488 S.E.2d at 542. Accordingly, the trial court did not abuse its discretion by determining that this evidence was admissible under Rule 403.

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II. Admission of hearsay statements from the Dexter Street break-in

[2] Grady next argues that the trial court erred by admitting hearsay testimony from James Smith, the resident of the Dexter Street home. We also reject this argument.

“When preserved by an objection, a trial court’s decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*.” *State v. Johnson*, 209 N.C. App. 682, 692, 706 S.E.2d 790, 797 (2011). “Hearsay” is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.C. R. Evid. 801(c). Under the hearsay rule, “[h]earsay is not admissible except as provided by statute or by these rules.” N.C. R. Evid. 802.

Grady challenges the portion of Officer Rose’s testimony in which the officer described what James Smith told him when he arrived in response to Smith’s 911 call. In his appellate brief, Grady focuses entirely on the trial court’s failure to determine that Smith was unavailable and the court’s corresponding failure to conduct the “six-part inquiry to ascertain whether the hearsay evidence should be admitted” based on that unavailability.

We need not address this argument because this was not the hearsay exception asserted by the State or embraced by the trial court below. Instead, this case concerns the hearsay exception for present sense impressions in Rule 803. A “present sense impression” is defined as a “statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.” N.C. R. Evid. 803(1).

“The basis of the present sense impression exception is that closeness in time between the event and the declarant’s statement reduces the likelihood of deliberate or conscious misrepresentation.” *State v. Blankenship*, 259 N.C. App. 102, 114, 814 S.E.2d 901, 912 (2018). “There is no rigid rule about how long is too long to be immediately thereafter.” *Id.* Importantly, our Supreme Court has held statements to a law enforcement officer by someone who witnessed a crime are admissible as present sense impressions when the lapse in time between the witness’s perception and their statement was solely the short amount of time it took for the witness to arrive in the presence of the officer. *See State v. Morgan*, 359 N.C. 131, 155, 604 S.E.2d 886, 900–01 (2004) (collecting cases).

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Here, law enforcement received a call reporting a break-in on Dexter Street. Officer Rose arrived in response to that call at the same time that Smith, the resident of the home and the person who reported the break-in, also arrived. Smith was “agitated,” “excited,” and “angry.” He explained to Officer Rose that his home had just been broken into and showed the officer video footage of the break-in that was automatically sent to Smith’s cell phone through his home’s security system after the system detected motion inside the home. Smith then examined his home and informed Officer Rose that a television was missing.

The time stamp on the security footage from Smith’s phone was 10:17 a.m. Both Officer Rose and Smith arrived at the Dexter Street home within minutes after Smith viewed that footage and reported the crime.

In light of these facts, the trial court properly admitted Officer Rose’s testimony under the present sense impression exception to the hearsay rule. Smith’s statements were made within minutes after he first perceived the break-in through the security footage and then contemporaneously as he perceived the situation at his home when he arrived. These statements were “describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter” and thus properly fall within the exception for present sense impressions. *Morgan*, 359 N.C. at 154, 604 S.E.2d at 900.

We also note that, even if the challenged testimony—Officer Rose’s testimony about what Smith told him—was inadmissible hearsay, nearly all the key facts from that testimony also were admitted through other evidence, primarily from Officer Rose’s own observations of the scene when he arrived. That testimony, combined with Grady’s own admissions of his involvement in the Dexter Street break-in, left no reasonable possibility that, had this portion of Officer Rose’s testimony been excluded as hearsay, the jury likely would have reached a different result. *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001). Accordingly, even if we found error—and we do not—any error was harmless.

III. Denial of motion to dismiss the possession of firearm charge

[3] Finally, Grady argues that the trial court erred by denying his motion to dismiss the possession of a firearm by a felon charge. Grady contends that “there was no evidence whatsoever of any firearms either on or in the vicinity of” him in any witness account or security footage.

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“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). “Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

“Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant’s guilt may be drawn from the circumstances.” *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citation omitted).

“The offense of possession of a firearm by a convicted felon has two essential elements: (1) the defendant has been convicted of a felony, and (2) the defendant subsequently possessed a firearm.” *State v. Floyd*, 369 N.C. 329, 333, 794 S.E.2d 460, 463 (2016). Grady challenges only the sufficiency of the evidence as to the possession element. Possession can be shown by circumstantial evidence. *State v. Marshall*, 206 N.C. App. 580, 583, 696 S.E.2d 894, 897 (2010).

Here, the State’s evidence showed that Jason Gray had three guns and Game Stop bags in his house prior to the break-in and that he locked his house when he left home that morning. While Gray was gone, his next-door neighbor heard a loud noise coming from the direction of Gray’s house and then saw a man, later identified as Grady, walking away from Gray’s house carrying a bag. The neighbor checked her surveillance footage and saw Grady approach the home with nothing in his hands and then leave a short time later carrying a Game Stop bag. Although no witnesses saw what was in the Game Stop bag, Mr. Overby testified that there were “things in that bag . . . you could tell by looking at it” because it “stuck out on different sides or whatever and you could tell there was weight in the bag.” Shortly thereafter, the neighbors went to check on Gray’s house, found the door was kicked in, called police,

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and waited outside for them to arrive. When Gray returned home after being notified of the break-in, he found that his three guns were missing. The neighbors did not see anyone else around Gray's house that day.

This evidence is readily sufficient to overcome a motion to dismiss. Viewed in the light most favorable to the State, the evidence established that there was a break-in at the Fowler Street house, that the only way the guns could have gone missing from the house were as a result of that break-in, and that Grady was the one who broke into the house. From this, the jury reasonably could infer that Grady stole the guns and carried them away. *Rose*, 339 N.C. at 192, 451 S.E.2d at 223; *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455. Accordingly, the trial court did not err by denying Grady's motion to dismiss.

Conclusion

We find no error in the trial court's judgments.

NO ERROR.

Chief Judge McGEE and Judge HAMPSON concur.

STATE OF NORTH CAROLINA
v.
CARMELO LOPEZ, DEFENDANT

No. COA19-743

Filed 1 December 2020

1. Evidence—relevance—sexual offenses against a child—immigration status of victim's mother

In a prosecution for first-degree statutory sexual offense and taking an indecent liberty with a child, the trial court did not err by precluding defendant from cross-examining the victim's mother about her immigration status, where defendant argued at trial that the mother—an illegal immigrant—had a motive to fabricate the sexual abuse allegations in order to apply for a U Visa. Under Evidence Rule 401, the mother's immigration status was irrelevant to the issue of whether any sexual abuse occurred, and defendant could not support his theory about the mother's credibility because she never applied for a U Visa.

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2. Evidence—Rule 403—testimony—defendant’s refusal to test for sexually transmitted disease—sexual offenses against a child

In a prosecution for first-degree statutory sexual offense and taking an indecent liberty with a child, the trial court did not abuse its discretion by allowing the victim’s mother to testify that defendant refused to get tested for herpes after the victim had tested positive for herpes. Although defendant eventually got tested pursuant to a search warrant, the mother said nothing about defendant’s positive test results, which the trial court had already excluded under Evidence Rule 403 because the results did not show whether defendant had the same type of herpes as the victim; therefore, the mother’s testimony did not create a danger of unfair prejudice.

3. Sexual Offenders—first-degree statutory sexual offense—sexual act—penetration—sufficiency of evidence

The trial court properly denied defendant’s motion to dismiss a charge of first-degree statutory sexual offense where there was sufficient evidence of penetration needed to establish the “sexual act” element of the crime. Specifically, the victim testified that defendant touched her with his fingers “in the inside” in “the place where she goes pee.”

Judge MURPHY concurring in the result only with separate opinion.

Appeal by defendant from judgments entered on or about 22 January 2019 by Judge Jeffery K. Carpenter in Superior Court, Union County. Heard in the Court of Appeals 3 March 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jennifer T. Harrod, for the State.

W. Michael Spivey, for defendant-appellant.

STROUD, Judge

Defendant appeals his convictions for two counts of first degree statutory sexual offense and two counts of taking an indecent liberty with a child. Defendant contends the trial court erred in two evidentiary issues: not allowing evidence of the immigration status of a witness and allowing evidence that he refused a medical test; defendant also contends the trial court erred in denying his motion to dismiss. For the following reasons, we conclude there was no error.

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I. Background

The State's evidence showed that in 2016 defendant invited his girlfriend and her then approximately six-year old daughter, Jane,¹ to move in with him. Due to Jane's mother's work schedule, defendant was alone with Jane at night, and on multiple occasions she said he would take off her pants and "do bad stuff to me." Defendant used "[h]is hands and his tongue" to "touch[Jane] in the place that [she] go[es] pee[.]" Defendant would touch "with his fingers" "in the inside" of "the place where [she] go[es] pee[.]" Defendant would also touch "inside" "where [she] pee[d]" "with his tongue[.]"

Jane told her mother defendant "did something bad to [her]." Jane's mother confronted defendant; he originally denied the allegations but then asked her "not to charge him" and said "he had a lot of money in Mexico and he could give [her] whatever [she] needed." Soon after, Jane developed a rash "where [she] go[es] pee" that burned when she urinated. Jane's mother took Jane to the doctor, and she was diagnosed with genital herpes. Jane's mother was tested for genital herpes; she requested defendant also get tested, but he refused. A search warrant was then executed requiring defendant get tested; he tested positive.

A jury found defendant guilty of two counts of first degree statutory sexual offense and two counts of taking an indecent liberty with a child. The trial court entered judgment on the two counts of statutory sexual offense and arrested judgment on the two counts of taking an indecent liberty with a child. Defendant appeals.

II. Admission of Evidence

Defendant makes two arguments contending the trial court erred in the admission of evidence.

A. Standard of Review

Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for

1. A pseudonym is used to protect the identity of the minor involved.

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a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the abuse of discretion standard which applies to rulings made pursuant to Rule 403.

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. N.C. Gen. Stat. § 8C-1, Rule 401 (2013). Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. N.C. Gen. Stat. § 8C-1, Rule 403 (2013).

State v. Blakney, 233 N.C. App. 516, 520–21, 756 S.E.2d 844, 847–48 (2014) (citations, quotation marks, and brackets omitted). “We review a trial court’s Rule 403 determination for an abuse of discretion. An abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Baldwin*, 240 N.C. App. 413, 418, 770 S.E.2d 167, 171 (2015) (citations and quotation marks omitted).

B. Evidence Regarding Immigration Status of Jane’s Mother

[1] Defendant contends the trial court erred in not allowing him to cross-examine Jane’s mother regarding her immigration status. Defendant’s argument at trial was that by alleging her daughter was a victim of a crime, Jane’s mother could apply for a U Visa.² While defendant frames this as a “cross-examination” issue, the trial court allowed defendant to make an extensive proffer of Jane’s mother’s immigration status, and ultimately ruled the evidence was irrelevant; thus we address the actual legal issue before us, the relevancy of Jane’s mother’s immigration status.

The State’s attorney noted how far afield the questions had wandered and summarized Jane’s mother’s testimony during *voir dire* that she

2. “The U nonimmigrant status (U visa) is set aside for victims of certain crimes who have suffered mental or physical abuse and are helpful to law enforcement or government officials in the investigation or prosecution of criminal activity.” <https://www.uscis.gov/humanitarian/victims-human-trafficking-and-other-crimes/victims-criminal-activity-u-nonimmigrant-status> (last visited 1 July 2020).

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stated that she and the Defendant at no time discussed her applying for a Visa in this case. She has not applied for a Visa in this case. I can as an officer of the Court tell you that she has not applied for a Visa with our office as a victim in this case because I would have been consulted about it.

The discussion continued:

THE COURT: She's the parent of the victim. She's not the victim.

[State's Attorney]: Correct, your Honor. She can't apply. She can't apply under the law for U Visa, so she can't make application. I understand that [defendant's attorney] feels like this goes to the credibility of the witness. I don't understand how [Jane's] immigration status or [Jane's mother's] status in light of the fact that no application has been filed and that they did not discuss it in reference to this case, how that therefore allows for [defendant's attorney] to parade [Jane's mother's] immigration status in front of the jury. She's already insinuated it to the jury. I don't get to parade the fact that Mr. Lopez is here illegally and that despite whatever happens with this case he's getting deported, I don't get to say that in front of the jury. She can ask questions that goes to credibility as it goes to this case, have you applied for a Visa, did you ever talk to Mr. Lopez about applying for a Visa in this case, but she has not provided enough for those issues to go in front of the jury. It is irrelevant, all of the questions about applying for marriage licenses and all of that. It's not relevant whatsoever to this case.

The trial court then asked defendant's attorney about the relevancy of the information she was seeking: "[W]hat does the information that you're seeking to elicit, what are facts of consequence does it make more or less probable?" Defendant's attorney responded simply, "Well, whether or not any sexual abuse actually occurred." The trial court then excluded the immigration status evidence under Rule of Evidence 401 and 403. Defendant now contends he had a right to question Jane's mother about her immigration status because "she may have had a motive to instigate, encourage, coach, or embellish allegations of abuse to avoid possible deportation because she was an illegal immigrant."

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We agree with the trial court's ruling on relevancy of the evidence and disagree with defendant's assertions that Jane's mother's immigration status "has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence[;]" the fact here being "whether or not any sexual abuse actually occurred." N.C. Gen. Stat. § 8C-1, Rule 401 (2017). Defendant has not demonstrated how fabricating sexual abuse would allow Jane's mother "to avoid possible deportation because she was an illegal immigrant[;]" particularly in light of the fact that Jane's mother had not applied for the U Visa defendant was claiming as the motive for the lie.

Defendant focuses his argument to this Court on the importance of being able to question a witness's credibility and bias. We note that to the extent defendant wanted to question Jane's mother about fabricating the sexual abuse or to attack her credibility, he was free to do so; the only prohibition was information regarding her immigration status. Accordingly, we overrule this argument. Because Jane's mother's immigration status was not relevant, we need not address defendant's argument regarding Rule 403. *See generally* N.C. Gen. Stat. § 8C-1, Rule 403 (2017) (noting relevancy as a precursor to other considerations of exclusion).

C. Evidence Regarding Testing for Herpes

[2] During defendant's trial there was much discussion regarding whether evidence of defendant's positive herpes test, taken after being arrested, should be admitted as evidence to the jury. As to the issue on appeal, the trial court allowed Jane's mother to testify that she asked defendant to be tested after Jane had tested positive for herpes, and he refused to be tested. Later, a search warrant was executed to test defendant for herpes; that test was positive, but it did not distinguish whether defendant had the same type of herpes, Type 1 or Type 2, that Jane had. The State sought to present evidence of defendant's positive herpes test, but the trial court excluded that evidence based on Rule 403 because the positive test results did not show that the type of herpes was the same as that which infected Jane. Again, "[w]e review a trial court's Rule 403 determination for an abuse of discretion. An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Baldwin*, 240 N.C. App. at 418, 770 S.E.2d at 171.

Defendant contends that "the trial court erred by admitting evidence that . . . [defendant] would not submit to testing for herpes after it

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excluded the results of any test upon . . . [defendant] because the danger of unfair prejudice substantially outweighed the probative value of the evidence.” (Original in all caps.) Defendant does not contest the relevance of Jane’s mother’s testimony under Rule 401 regarding her request that defendant be tested but only contends that it was unfairly prejudicial. Beyond stating general law regarding Rule 403 and the admission of evidence, defendant cites no law supporting his contention of error by the trial court.

Defendant’s general contention is that “[t]he State’s case rested heavily upon convincing the jury that [Jane] must have been infected with herpes by Mr. Lopez.” If the State intended for its case to rest heavily on this fact, the trial court’s exclusion of the results of defendant’s herpes test frustrated that intent. Defendant’s objections to evidence of the test results were sustained. The trial court did not allow the State to present evidence regarding defendant’s test results. But over the defendant’s objection, the jury heard evidence of defendant’s refusal to be tested upon Jane’s mother’s request. Even if the trial court had sustained defendant’s objections and not allowed the contested testimony, the jury would still have been in the same position. There was evidence that Jane had herpes but there would be no evidence as to whether defendant was ever tested or what the results of that test were – since defendant successfully objected to the State’s proffered evidence that he was later tested and the type of herpes was unknown.

The *only* information that Jane’s mother actually provided is that defendant refused to be tested, and we do not deem that to be unfairly prejudicial or otherwise prohibited under Rule 403. *See id.* N.C. Gen. Stat. § 8C-1, Rule 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”). The trial court did not abuse its discretion in overruling defendant’s objection to this evidence. This argument is overruled.

III. Motion to Dismiss

[3] Last, defendant contends the trial court erred when it denied his motion to dismiss one of the charges of first degree statutory sexual offense due to the insufficiency of the evidence. Defendant challenges only the statutory sexual offense convictions based on penetration with his fingers; he does not challenge the conviction of statutory sexual offense based on cunnilingus or the two convictions for taking an indecent liberty with a child.

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The proper standard of review on a motion to dismiss based on insufficiency of the evidence is the substantial evidence test. The substantial evidence test requires a determination that there is substantial evidence (1) of each essential element of the offense charged, and (2) that defendant is the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If there is substantial evidence of each element of the charged offense, the motion should be denied.

State v. Key, 182 N.C. App. 624, 628-29, 643 S.E.2d 444, 448 (2007) (citations and quotation marks omitted). “When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State’s favor.” *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009).

“A person is guilty of first-degree statutory sexual offense if the person engages in a sexual act with a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim.” N.C. Gen. Stat. § 14-27.29(a) (2017). A “sexual act” for purposes of this conviction “means the penetration, however slight, by any object into the genital or anal opening of another person’s body[.]” N.C. Gen. Stat. § 14-27.20(4) (2017). In *State v. Bellamy*, this Court determined that the standard of proving penetration for a sexual offense was the same as that of rape: “evidence that the defendant entered the labia is sufficient to prove the element of penetration.” 172 N.C. App. 649, 658, 617 S.E.2d 81, 88 (2005) (“Our Supreme Court has held that in the context of rape, evidence that the defendant entered the labia is sufficient to prove the element of penetration. We find no reason to establish a different standard for sexual offense.” (citation omitted)).

Defendant compares his case to two others where the evidence of penetration was found to be insufficient. See *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987); *State v. Whittenmore*, 255 N.C. 583, 122 S.E.2d 396 (1961). In *Hicks*, the witness provided “ambiguous testimony that defendant ‘put his penis in the back of me.’” 319 N.C. at 90, 352 S.E.2d at 427. In *Whittenmore*, the witness testified,

He then told me to pull off my pants[.] I pulled my pants below [m]y knees. After I pulled my panties down below my knees, he put his privates against mine. He was laying on his back and made me lay down on him. I stayed inside the house about two or three minutes before he

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told me to pull my panties down. After he went in the house, he pulled his trousers off of one leg and laid down flat on his back on the floor. He made me put my hands on his privates and he put his hand on my privates. He kept it there about two or three minutes; he just left it there. After he had done that for two or three minutes, he put his mouth on my breast and after that he put it on my privates and kept his mouth there about one or two minutes. He just left it there[.] He had his privates at my privates rubbing it up and down. I said at. He did that about one or two minutes[.]

255 N.C. at 586, 122 S.E.2d at 398 (asterisks omitted). We conclude *Whittenmore* and *Hicks* are inapposite.

Here, Jane testified that defendant touched her with his fingers “in the inside” in “the place where [she] go[es] pee[.]” Jane testified,

You said that [defendant] would touch you with his hands. What part of his hand would [defendant] touch you with?

A His fingers.

Q And what did Carmelo do with his fingers when he would touch you? Did he move his fingers at all when he would touch you?

A Yes.

Q Okay. And how would he move his fingers when he touched you? Do you think you could show me what he did with his fingers? If you like held your fingers up in the air, do you think you could show me what he did with his fingers? If you don't think you can, you can tell me that. That's okay. [Jane], I'm going to ask you a different question. Okay?

A Okay.

Q Do you know that the place where you go pee has an inside and an outside?

A Yes.

Q When Carmelo would touch you with his fingers, would he touch you on the inside or on the outside?

A I think in the inside.

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Q Okay. Did that hurt? How did it feel?

A It felt really bad.

Jane's statements are not like in *Hicks* wherein it is unclear where exactly the defendant put his penis on the witness's private parts, and *Whittenmore* where it is unclear what exactly defendant did to the witness's private parts. See *Hicks*, 319 N.C. at 90, 352 S.E.2d at 427; *Whittenmore*, 255 N.C. at 586, 122 S.E.2d at 398. As this Court has previously noted,

a prosecuting witness is not required to use any particular form of words to indicate that penetration occurred. While we encourage the State to clarify the testimony of a witness, we note the tendency of our appellate courts to permit a wide range of testimony to indicate penetration. Our standard of review requires us to view the evidence in the light most favorable to the State[.]

State v. Kitchengs, 183 N.C. App. 369, 375–76, 645 S.E.2d 166, 171 (2007) (citations omitted).

Our Supreme Court has noted that young children often do not use technically correct terminology to refer to their body parts, but if the meaning is clear, the evidence may be sufficient to prove the elements of the crime. See generally *State v. Rogers*, 322 N.C. 102, 105, 366 S.E.2d 474, 476 (1988).

Although the victim did not use the word “vagina,” or “genital area,” when describing the sexual assault perpetrated upon her, she did employ words commonly used by females of tender years to describe these areas of their bodies, of which they are just becoming aware. Other cases have come before this Court in which young children have used words similar or identical to those used by the victim to describe the male and female sex organs, and the children's testimony was found to be sufficient to prove the essential elements of a sexual offense. See, e.g., *State v. Griffin*, 319 N.C. 429, 355 S.E.2d 474 (1987) (nine-year-old victim testified defendant touched her on her “private parts”); *State v. Watkins*, 318 N.C. 498, 349 S.E.2d 564 (1986) (seven-year-old victim testified defendant placed his finger in her “coodie cat” and used dolls to indicate the vaginal area); *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985) (four-year-old victim testified defendant

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touched her “project” with his “worm” and pointed to her vaginal area).

Id. Here, Jane testified that defendant touched her “inside” the place where she goes pee; this testimony alone is sufficient evidence of a sexual act and thereby of a sexual offense, and thus we need not address the other corroborating evidence. This argument is overruled.

IV. Conclusion

We conclude the defendant received a fair trial, free of error based upon the issues presented on appeal.

NO ERROR.

Judge BRYANT concurs.

Judge MURPHY concurs in the result only with separate opinion.

MURPHY, Judge, concurring in result only.

A. Immigration Status of Jane’s Mother

I concur in result only with part II-B of the Majority, as the trial court correctly found the evidence irrelevant based on the lack of information presented to the trial court and on appeal to support the availability of a U-Visa to mother, but write separately to address the more general issue of the relevance of immigration status in this situation.

At trial, Defendant attempted to cross-examine Jane’s mother regarding her immigration status and knowledge of U-Visas, which permit an undocumented immigrant to gain legal status if they are a victim of a crime, among other requirements. *See* 8 U.S.C. § 1101(a)(15)(U) (2019). After the State objected, the trial court permitted a voir dire proffer of testimony from Jane’s mother, which in relevant part included:

[DEFENDANT:] So you are aware that there is a Visa that’s available to somebody who is a victim of a crime?

[Jane’s mother:] Yes.

...

[DEFENDANT:] Is [Jane] a citizen of the United States?

[Jane’s mother:] Yes.

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[DEFENDANT:] And you are not a documented – you do not have documentation to be in this country; correct?

[Jane's mother:] Exactly.

[DEFENDANT:] Do you worry about being separated from [Jane] because of your status?

[Jane's mother:] Of course I do.

[DEFENDANT:] Is that something that you think about every day?

[Jane's mother:] Of course.

[DEFENDANT:] And if you were able to apply for a Visa, then you would be able to stay legally in this country; correct?

[Jane's mother:] Of course.

[DEFENDANT:] And then you would not have to worry about being separated from [Jane]; correct?

[Jane's mother:] Exactly

Following this proffer of evidence, Defendant argued:

[DEFENDANT]: Your Honor, I believe that this information is relevant in this case of there is the issue of the delayed disclosure. And one reason why there could be a delayed disclosure is due to coaching. And some of the information that was provided by the mother could be motivation for coaching [Jane] about what to say. And it also goes to the credibility of the witness.

The State then asked if Jane's mother had "applied for a Visa because [Jane] was a victim of [Defendant]," to which she replied "[n]o." There was the following discussion of the relevance of the proffered testimony:

THE COURT: [Defendant], what does the information that you're seeking to elicit, what are [sic] facts of consequence does it make more or less probable?

[DEFENDANT]: Well, whether or not any sexual abuse actually occurred.

THE COURT: Well, she's not the testifying witness in regards to that. If you wanted to use that in regards to

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[Jane's] testimony, maybe, maybe you're on a better track but – of [Jane] – if in fact the evidence is to be believed by the jury, [Jane] would be the victim. This is the parent of the victim. There is a long bridge to cross to get to the point to where [Jane's mother] has created a situation, coached the victim. I just don't have information at this point to get to that conclusion. It may be something that you in your case in chief you may can explore in order to – motive to create a story on behalf of [Jane's mother].

Regardless under Rule 401 whether the evidence is relevant or not, the issue is whether or not [Defendant] committed first degree sexual offense and indecent liberties with a child. The immigration status will consume all the oxygen in the room and we will end up with an impromptu exploration, basically a Discovery session in regards to probably exploring the feelings of the prospective jurors as they might relate to the legal status of folks. I don't think the evidence is relevant at this point under Rule 401. It may become relevant. You may be able to get to that point in your case in chief, but at this point there's not a substantial enough relationship between this evidence that I believe it is relevant to any fact or circumstance or fact of consequence.

But even if it is, in the discretion of the Court the probative value of such evidence is substantially outweighed by the probability that the confusion of issues will mislead the jury in regards to the issues to be determined in this case. So at this point based on Rule 401 I don't believe that the evidence is relevant. But even if it is, if a court of review later determines that it is, in my discretion I will exclude the evidence under Rule 403 in my discretion. So it may be a situation where you can develop that as you go through and get the two respective universes of what we're here for and the immigration status question together and build a bridge and it may not – I don't want to foreclose the possibility of that. There is the possibility it can be done. At this point I don't have – they're just too far apart.

Based on the evidence presented by Defendant below, I agree with the trial court's, and Majority's, conclusion the evidence was not yet relevant. *Supra* at 444. Rule 401 defines "relevant evidence" as "evidence

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having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C.G.S. § 8C-1, Rule 401 (2019). For Jane’s mother’s immigration status and knowledge of U-Visas to be relevant, such information must have had a tendency to make it more likely Jane or her mother fabricated the sexual assault and her mother coached Jane to testify falsely. To do this, Defendant must have presented some evidence Jane’s mother was aware of the possible availability of the U-Visa to her before reporting the alleged assault or, since credibility is for the jury, shown the U-Visa was in fact available to her.

Defendant did not present such evidence or legal authority below or on appeal. At most, Defendant presented evidence that Jane’s mother was aware U-Visas are available to *victims* of crimes; however, the victim of the crime, Jane, was already a United States citizen. There is no indication from the evidence at trial, the Record on appeal, or any legal argument made, that a U-Visa could be available to Jane’s mother or that Jane’s mother believed it was available to her. As a result, Jane’s mother’s immigration status and knowledge of the availability of U-Visas to *victims* did not have any tendency to make it more or less likely that the sexual assault did or did not occur. Since this evidence was not relevant as presented below and in this appeal, it was properly excluded by the trial court under Rule 402. *See* N.C.G.S. § 8C-1, Rule 402 (2019) (“All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible.”).

While there is an argument to be made that a U-Visa could be available to Jane’s mother as an indirect victim of a crime,³ Defendant has failed to present any such argument to the trial court or on appeal.

3. To be eligible for a U-Visa, 8 U.S.C. § 1101(a)(15)(U) requires, among other things, “the alien [to have] suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii).” 8 U.S.C. § 1101(a)(15)(U)(i)(I) (2019). The meaning of “victim of criminal activity” is clarified by 8 C.F.R. § 214.14(a)(14)(i), which states, “[t]he alien spouse, children under 21 years of age and, if the direct victim is under 21 years of age, parents and unmarried siblings under 18 years of age, will be considered victims of qualifying criminal activity where the direct victim is deceased due to murder or manslaughter, or is incompetent or incapacitated, and therefore unable to provide information concerning the criminal activity or be helpful in the investigation or prosecution of the criminal activity.” 8 C.F.R. § 214.14(a)(14)(i) (2020). Read together, there is a meritorious argument that, as indirect victims, certain family members of young victims of crime can petition for a U-Visa if they satisfy all elements of 8 U.S.C. § 1101(a)(15)(U). *See, e.g.,* Elizabeth M. McCormick, *Rethinking Indirect Victim Eligibility for U Non-Immigrant Visas to Better Protect Immigrant Families and Communities*, 22 Stan. L. & Pol’y Rev. 587, 612-620 (2011) (describing the origins of indirect victims’ eligibility for U-Visas).

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The function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.

N.C. R. App. P. 28(a). “[I]t is the appellant’s burden to show error occurring at the trial court, and it is not the role of this Court to create an appeal for an appellant or to supplement an appellant’s brief with legal authority or arguments not contained therein.” *Thompson v. Bass*, 261 N.C. App. 285, 292, 819 S.E.2d 621, 627 (2018), *rev. denied*, 828 S.E.2d 617 (N.C. 2019); *see also Viar v. N.C. Dep’t of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam) (“It is not the role of the appellate courts . . . to create an appeal for an appellant.”). As a result, Defendant’s argument is limited to what was preserved at the trial court and presented on appeal, and I do not address the potential eligibility of U-Visas to Jane’s mother.

Here, there is no persuasive argument advanced for us to find Jane’s mother’s immigration status and knowledge of U-Visas were relevant for cross-examination. However, generally when there is proper evidence at trial of the applicability of U-Visas to a witness, or of a witness’s belief that she would be eligible for a U-Visa as a result of being the victim of a crime, such evidence would be relevant evidence under Rule 401 that a defendant could cross-examine a witness about to attempt to show a motive to lie or to coach an alleged victim to lie. In such a situation, the evidence would still need to satisfy Rule 403. However, this reasoning is inapplicable where Defendant failed to present evidence or an argument that would make Jane’s mother’s immigration status and knowledge of U-Visas relevant.

B. Defendant’s Refusal to Be Tested for Herpes

I concur in result only with part II-C of the Majority as to the evidence regarding Defendant’s refusal to be tested for herpes. Defendant argues “[t]he trial court erred by admitting evidence that [Defendant] would not submit to testing for herpes after it excluded the results of any test upon [Defendant] because the danger of unfair prejudice substantially outweighed the probative value of the evidence.” In addressing this issue, the Majority states

[e]ven if the trial court had sustained [D]efendant’s objections and not allowed the contested testimony, the jury

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would still have been in the same position. There was evidence that Jane had herpes but there would be no evidence as to whether [D]efendant was ever tested or what the results of that test were – since [D]efendant successfully objected to the State’s proffered evidence that he was later tested and the type of herpes was unknown.

Supra at 445. I disagree.

If Jane’s mother’s testimony regarding Defendant’s refusal of her request to be tested for herpes had been excluded, then Defendant would not have been in the same position at trial. This testimony could have been read by the jury to suggest Defendant knew or suspected he had herpes and refused to be tested because he knew it could suggest he had sexually assaulted Jane. In the absence of this testimony, there was no evidence tending to show Defendant had herpes, might have had herpes, or might have suspected he infected Jane with herpes. If the evidence had been excluded, then Defendant would not have been in the same position at trial. Nonetheless, I agree with the Majority’s conclusion the trial court did not abuse its discretion in admitting the evidence under Rule 403. *Supra* at 445.

Under Rule 403, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.C.G.S. § 8C-1, Rule 403 (2019). “We review a trial court’s Rule 403 determination for an abuse of discretion. . . . An abuse of discretion results where the [trial] court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Baldwin*, 240 N.C. App. 413, 418, 770 S.E.2d 167, 171 (2015) (internal citations and marks omitted). Defendant only contends the evidence was unfairly prejudicial, so I only address if the testimony’s probative value was substantially outweighed by the danger of unfair prejudice. “Unfair prejudice means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, on an emotional one.” *Id.* (internal marks and alterations omitted). It was not an abuse of discretion to admit Jane’s mother’s testimony that Defendant refused to be tested for herpes.

The evidence had strong probative value because it potentially indicated Defendant’s unwillingness to be tested for herpes because he was concerned it would suggest he sexually assaulted Jane. There was no danger of unfair prejudice as the evidence did not improperly suggest

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Defendant was guilty merely because he might have had herpes; it also focused on Defendant's willingness to discover the source of Jane's herpes. Even if the evidence did present a danger of unfair prejudice, Defendant has not shown any danger of unfair prejudice, much less shown it substantially outweighed any probative value and was an abuse of discretion not to exclude. As a result, I agree with the Majority's conclusion the trial court did not abuse its discretion in admitting evidence of Defendant's unwillingness to be tested for herpes under Rule 403. *Supra* at 445.

C. Motion to Dismiss

The Majority concludes Jane's testimony was sufficient evidence of penetration, in part relying on caselaw that acknowledges children use different words to describe genital areas. *Supra* at 445-49. I agree with the Majority's analysis and use of such caselaw to the extent Defendant takes issue with Jane's description of where Defendant touched her not using anatomical terms. However, I believe the Majority does not address part of Defendant's argument and I write separately to fully address it. Nonetheless, I agree with the Majority's conclusion there was sufficient evidence of digital penetration and the cases cited by Defendant are inapposite.

Defendant takes issue with the sufficiency of the evidence presented to prove penetration, arguing Jane's testimony "I think in the inside [of where I go pee]" when describing where Defendant touched her was "uncertain testimony [that] left the jury to rely on speculation and conjecture to decide whether penetration occurred" and "[n]o other substantive evidence addressed whether penetration occurred." Although Defendant initially appears to contend, in part, the description of where Jane was touched was "vague and ambiguous," Defendant clarifies in his reply brief that "[t]he ambiguity in [Jane's] testimony does not arise from the use of prepositions or a child's use of childish descriptive language, but because she was uncertain about whether [Defendant] put his fingers inside her." Therefore, I read Defendant's argument on this issue to be based on Jane's use of "I think" when describing where Defendant touched her.

As the Majority correctly lays out, in reviewing a motion to dismiss based on the insufficiency of the evidence we must determine if "there [was] substantial evidence [] of each essential element of the offense charged, and [] that [the] defendant is the perpetrator of the offense." *State v. Key*, 182 N.C. App. 624, 628-29, 643 S.E.2d 444, 448 (2007). "Substantial evidence is such relevant evidence as a reasonable mind

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might accept as adequate to support a conclusion.” *Id.* at 629, 643 S.E.2d at 448. Additionally, on a motion to dismiss for insufficient evidence we view the evidence in the light most favorable to the State. *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009).

If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed. . . . This is true even though the suspicion so aroused by the evidence is strong.

State v. Powell, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted).

Defendant challenges the sufficiency of the evidence for his conviction of N.C.G.S. § 14-27.29(a), which reads “[a] person is guilty of first-degree statutory sexual offense if the person engages in a sexual act with a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim.” N.C.G.S. § 14-27.29(a) (2019). Defendant only challenges evidence of a sexual act on appeal, so only this element must be analyzed. N.C. R. App. P. 28 (2019) (“The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party’s brief are deemed abandoned.”). “Sexual act” is defined as “the penetration, however slight, by any object into the genital or anal opening of another person’s body.” N.C.G.S. § 14-27.20(4) (2019). Our Supreme Court has held ambiguous evidence of penetration cannot withstand a motion to dismiss for insufficient evidence. *See State v. Hicks*, 319 N.C. 84, 90, 352 S.E.2d 424, 427 (1987) (finding victim’s testimony that the defendant “put his penis in the back of me” to be ambiguous and insufficient to show penetration in the absence of corroborative evidence); *State v. Whittemore*, 255 N.C. 583, 586, 122 S.E.2d 396, 398 (1961) (finding victim’s testimony that the defendant “put his privates against mine” and “had his privates at my privates rubbing it up and down” to be insufficient to show penetration on its own).

Here, Jane testified “I think in the inside” when asked if Defendant would “touch [her] with his fingers . . . on the inside or on the outside[.]” As the Majority makes clear, Jane’s description of her genital area was sufficient to describe penetration. *Supra* at 447-49. However, still at issue is whether Jane’s use of “I think” made this testimony ambiguous evidence of penetration. In order to resolve this issue, it is useful to survey Jane’s use of “yes,” “no,” “I don’t know,” “I don’t remember,” and “I think” throughout her testimony.

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[STATE:] Okay. So when you were in kindergarten, did you turn six years old that October?

[JANE:] *I think.*

[STATE:] Okay. Do you remember if you went to the same school that you do now?

[JANE:] *No.*

...

[STATE:] Okay. When you were in kindergarten and [Defendant] was a friend of your mom's, did you guys ever live together?

[JANE:] We -- my mom said -- actually [Defendant], he -- I think my mom and [Defendant] had a discussion and then -- then [Defendant] just picked me up and then he said if I wanted him to be my dad and I said *yes*.

...

[STATE:] Did anybody else live with you?

[JANE:] *No.*

[STATE:] No? Where had you lived before you lived with [Defendant] and your mom?

[JANE:] *I don't remember.*

...

[STATE:] No. Okay. When you would go to your grandma's house, [Jane], how would you get home after you went to your grandma's house?

[JANE:] Well, [Defendant] used to pick me up.

[STATE:] Did [Defendant] -- at the beginning of kindergarten when you guys first lived with [Defendant], when you and your mom first lived with [Defendant], did [Defendant] pick you up or did somebody else pick you up?

[JANE:] *I think* [Defendant] picked me up.

...

[STATE:] Do you remember if you were awake or you were asleep when your mom would come home?

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[JANE:] Awake.

[STATE:] You were awake?

[JANE:] (*Witness nods head affirmatively.*)

[STATE:] Did you go back to sleep when your mom would come home? Would you go to bed when your mom came home?

[JANE:] *I think so.*

...

[STATE:] Okay. And when this would happen and you were laying on the bed, where was [Defendant]?

[JANE:] *I think* he was taking a shower.

[STATE:] He was taking a shower?

[JANE:] (*Witness nods head affirmatively.*)

[STATE:] When [Defendant] would touch you in a way that you didn't like, was he in the bedroom with you?

[JANE:] *Yes.*

[STATE:] Okay. So when you said that he was taking a shower, was that before or after he would touch you, if you remember?

[JANE:] *I don't remember.*

...

[STATE:] Do you know that the place where you go pee has an inside and an outside?

[JANE:] *Yes.*

[STATE:] When [Defendant] would touch you with his fingers, would he touch you on the inside or on the outside?

[JANE:] *I think in the inside.*

[STATE:] Okay. Did that hurt? How did it feel?

[JANE:] It felt really bad.

...

[STATE:] And would he touch where you pee with his tongue? Is that yes?

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[JANE:] *Yeah.*

[STATE:] Okay. When [Defendant] would touch you with his tongue, did he touch you on the inside or on the outside with his tongue?

[JANE:] *Inside.*

[STATE:] And how did that feel?

[JANE:] Bad.

...

[STATE:] [Jane], when [Defendant] would do this to you, would you ever say anything to him? Did you say yes or no? Do you remember if you ever said anything to him?

[JANE:] *I don't remember.*

[STATE:] Okay. Do you remember if you ever tried to hit him or fight him off of you?

[JANE:] *I think.*

[STATE:] You think?

[JANE:] (*Witness nods head affirmatively.*)

...

[STATE:] Do you remember if [Defendant] ever held you down while he was doing this to you?

[JANE:] *I don't know.*

...

[STATE:] Do you remember if you went to the hospital or to see a doctor?

[JANE:] *I think we first went to see a doctor.*

...

[STATE:] And did the doctor ask you if anybody had ever touched you?

[JANE:] *I don't remember. . . .*

[STATE:] Did she ask you if anybody had ever touched you?

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[JANE:] *I don't remember.*

...

[STATE:] And do you remember how many times you went to Treehouse?

[JANE:] Like *I think* ten.

[STATE:] Ten?

[JANE:] *Uh-huh.*

...

[STATE:] Okay. [Jane], after your -- did your rash get better after a little while?

[JANE:] *I think so.*

...

[STATE:] Okay. And did you tell her about how [Defendant] touched you where you pee with his fingers and with his tongue?

[JANE:] *I think so.*

...

[STATE:] Some happy. Did you make more than one happy drawing or just one happy drawing?

[JANE:] *I think* just one happy drawing.

...

[STATE:] Do you recognize what this is? Do you recognize what this book is?

[JANE:] *I think so.*

[STATE:] You think so. Is this the book that you sometimes drew in when you were in kindergarten?

[JANE:] *Yes.*

[STATE:] Okay. And is this the book that you drew the sad picture in?

[JANE:] *Yes.*

...

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[STATE:] And did you know how to draw it, because that's what actually happened?

[JANE:] *Yes.*

[STATE:] Okay. Do you remember if you drew that multiple times for your mom?

[JANE:] *I think so.*

...

[STATE:] [Jane], the rash that you had, --

[JANE:] *Yes.*

[STATE:] -- do you still get that rash sometimes?

[JANE:] *I don't know.*

[STATE:] You don't know. Does it sometimes still hurt for you to go to the bathroom?

[JANE:] *No.*

...

[STATE:] Has anybody else ever put their fingers in the place where you go pee?

[JANE:] *No.*

[STATE:] Has anybody else ever put their mouth in the place where you go pee?

[JANE:] *No. . . .*

[STATE:] No? Okay. [Jane], [Defendant] is the one that did these things to you?

[JANE:] *Yes.*

...

[DEFENDANT:] And did you talk about what happened with [the State's attorney]? [The State's attorney] who just asked you a lot of questions.

[JANE:] *I don't know.*

(Emphasis added).

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Defendant contends Jane's use of "I think" when addressing where Defendant touched her "was too vague and ambiguous to permit the jury to do any more than speculate that *maybe* penetration occurred." Although in some situations this argument could have merit, based on the testimony in this case it does not. Based on Jane's testimony, viewed in the light most favorable to the State, her testimony was not "vague and ambiguous" as to whether digital penetration occurred. When looking at the entirety of Jane's testimony, it is clear she used "yes" and "no" according to their normal meanings and she consistently said "I don't know" or "I don't remember" when she was unsure of something or did not know of its truth. Based on her use of language, in the light most favorable to the State she used "I think" as an expression of belief that something occurred, which was weaker than an absolute "yes," but stronger than "I don't know." Although this use of "I think" expresses some doubt, in that it was not an absolute "yes," it was not "vague and ambiguous" evidence that only "permit[s] the jury to . . . speculate that *maybe*" there was penetration, as Defendant contends. Instead, as it was used here, it was evidence that Jane believed Defendant touched her inside, which would constitute penetration.

Furthermore, Jane appears to have used "I think" interchangeably with "yes" at times, including in the following testimony:

[STATE:] Do you recognize what this is? Do you recognize what this book is?

[JANE:] *I think so.*

[STATE:] You think so. Is this the book that you sometimes drew in when you were in kindergarten?

[JANE:] *Yes.*

[STATE:] Okay. And is this the book that you drew the sad picture in?

[JANE:] *Yes.*

(Emphasis added).

Regardless of whether "I think" was used to reflect Jane's belief that Defendant touched her inside of where she goes pee, or used as an equivalent to "yes," Jane's testimony was sufficient evidence of penetration to survive a motion to dismiss. Even if "I think" indicated Jane had some doubt, the testimony does not rise to a level of ambiguity requiring dismissal, like in *Hicks* and *Whittemore*. Instead, Jane testifying "I think in the inside" in response to a question about where Defendant touched

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her, was such relevant evidence as a reasonable mind might accept as adequate to support a conclusion Defendant did digitally penetrate her.

Furthermore, since this evidence of penetration was not ambiguous, it was appropriately presented to the jury, which determined the meaning of the phrase in light of the live testimony and how Jane used the phrase throughout her testimony. Ultimately, if “I think” reflected a lack of confidence, the jury was in the best position to determine what weight to give her testimony, and in finding Defendant guilty beyond a reasonable doubt of a sexual offense based on digital penetration the jury determined Jane’s use of “I think” did not indicate uncertainty.

Finally, even if Jane’s initial testimony was ambiguous, the following testimony was subsequently heard:

[STATE:] Has anybody else ever put their fingers in the place where you go pee?

[JANE:] No.

[STATE:] Has anybody else ever put their mouth in the place where you go pee?

[JANE:] No. . . .

[STATE:] No? Okay. [Jane], [Defendant] is the one that did these things to you?

[JANE:] Yes.

Jane testified “yes” in response to a question if Defendant was the only person who ever “put [his] fingers in the place where [she goes] pee[.]” This testimony on its own constitutes unambiguous relevant evidence that a reasonable mind might accept as adequate to support a conclusion Defendant digitally penetrated Jane.

In summary, throughout her testimony there was a difference in Jane’s use of “yes,” “no,” “I don’t know,” “I don’t remember,” and “I think.” Her use of “I think” here could reflect her belief something occurred with some doubt, or that something affirmatively did occur, but it was not used to indicate complete uncertainty and was not “vague and ambiguous” evidence of penetration, as Defendant contends. As a result, regardless of which of the two possible meanings of “I think” is accurate in how it was used here, in the light most favorable to the State, Jane’s testimony that “[she] thinks [Defendant touched her with his fingers] in the inside [of where she goes pee]” was substantial evidence to support digital penetration. Additionally, even if this was ambiguous

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evidence of penetration that could not have been relied upon by the jury, there was other unambiguous evidence of penetration. The trial court rightly denied the motion to dismiss.

STATE OF NORTH CAROLINA

v.

DEZMEION DUBWHA PARKER

No. COA18-1175

Filed 1 December 2020

1. Appeal and Error—preservation of issues—sufficiency of evidence—motion to dismiss—preserves all related issues

In a prosecution for second-degree kidnapping, where defendant moved to dismiss the charge for insufficient evidence of the “consent” element, defendant did not waive appellate review of his argument challenging the sufficiency of the evidence for the “removal” element. Appellate Rule 10(a)(3) does not require a defendant to assert a specific ground for a motion to dismiss for insufficiency of the evidence, and therefore defendant’s motion preserved for appellate review all issues related to sufficiency of the evidence.

2. Kidnapping—second-degree—removal of person from one place to another—by fraud or trickery—sufficiency of evidence

The trial court properly denied defendant’s motion to dismiss a charge of second-degree kidnapping where the State presented substantial evidence that defendant, under the pretext of giving his cousin a ride to the cousin’s community college, fraudulently induced his cousin to enter his car so that defendant could rob the cousin at gunpoint in a secluded location. Despite inconsistent testimony about whether it was defendant or his girlfriend who drove the car (which, at any rate, was for the jury to resolve and did not require dismissal), the evidence of defendant’s use of fraud or trickery was enough to satisfy the “unlawful removal” element of second-degree kidnapping.

3. Constitutional Law—effective assistance of counsel—counsel’s failure to stipulate to prior conviction—sufficiency of record on appeal

On appeal from convictions for possession of a firearm by a felon and other crimes, where defendant argued that his trial

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attorney rendered ineffective assistance of counsel by failing to stipulate to defendant's prior conviction for felony larceny (thereby enabling the State to introduce evidence of that prior conviction in order to prove defendant's status as a felon—an essential element of the possession charge), the record on appeal was insufficient to permit meaningful review of defendant's argument. Consequently, defendant's ineffective assistance of counsel claim was dismissed without prejudice to his right to reassert the claim in a motion for appropriate relief before the trial court.

Appeal by defendant from judgments entered 26 February 2018 by Judge Walter H. Godwin, Jr., in Edgecombe County Superior Court. Heard in the Court of Appeals 5 February 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Denise Stanford, for the State.

Gilda C. Rodriguez for defendant-appellant.

ZACHARY, Judge.

Defendant Dezmeion Dubwha Parker appeals from judgments entered upon his convictions for robbery with a dangerous weapon, second-degree kidnapping, possession of a firearm by a felon, and attaining the status of a habitual felon. On appeal, Defendant argues: first, that the State presented insufficient evidence that Defendant “personally” effected the victim's unlawful removal from one place to another, and therefore, the trial court erred by denying his motion to dismiss the second-degree kidnapping charge; and second, that his trial attorney rendered ineffective assistance of counsel by failing to stipulate to Defendant's prior conviction for the purpose of establishing his status as a felon for the charge of possession of a firearm by a felon.

After careful review, we conclude that Defendant received a fair trial, free from error. However, because the appellate record is insufficient to enable full and fair review of Defendant's claim for ineffective assistance of counsel, we dismiss that portion of his appeal without prejudice to Defendant's right to reassert his claim in a subsequent motion for appropriate relief filed in the trial court.

Background

The evidence presented at trial, taken in the light most favorable to the State, tended to show the following:

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Defendant met Zaquinton Best, the victim in this case, sometime in or around the summer of 2016, while Best was living with his half-brother. At that time, Best had a vehicle, and he would “drive [Defendant] around whenever he needed to go somewhere.” Defendant and Best became “cousin[s] by marriage” soon thereafter.

In April 2017, Best’s car was in the shop with a blown head gasket, so he took the bus to class at Nash Community College while his vehicle was under repair. On 26 April 2017, Best saw Defendant at the bus station, and they began talking. Defendant said that he had recently acquired a vehicle; he gave Best his phone number and told Best to call whenever he needed a ride.

The next day, on 27 April 2017, Best called Defendant and asked him for a ride to Walmart, and then to the Community College. Best told Defendant that he planned to cash a check at Walmart, and that he intended to use the money to pay bills and school fees, and to get his car out of the shop. Defendant agreed to give Best a ride, and they, joined by Defendant’s girlfriend, traveled to Walmart.

Best entered Walmart alone and cashed his check. When he returned to the car approximately ten minutes later, Defendant informed him that “he had to make a quick stop somewhere” before he took Best to the Community College. Best asked where they were going, and Defendant answered that “he was going to show [Best].” Defendant was driving at that time, and he instructed Best to get in the backseat of the vehicle; Best trusted Defendant, so he complied and “just sat back.”

After a while, however, Best realized that they were driving in the wrong direction from the Community College, and his concerns mounted as the area became less recognizable to him. But whenever Best requested further details about their destination for this unexpected detour, Defendant only said, noncommittally, that “he was going to show [Best].”

The vehicle eventually stopped on a secluded dirt road, surrounded by cotton fields and beehive boxes, in a remote area comprising “nothing but open land” more than 20 miles away from the Walmart (and in the opposite direction from the Community College). Defendant exited the vehicle, pointed a gun at Best, and ordered him to get out of the car. Defendant demanded that Best “give [him] everything” that he had, and Best surrendered the cash that he had been storing in his sock; Defendant, however, told Best that he knew that he had more money on him, and he instructed Best to remove his clothes. With Defendant’s gun still in his face, Best “strip[ped] down” to his “underclothes” and

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surrendered additional cash. Defendant took Best's cell phone, conducted a final pat-down search for any remaining cash, and then he and his girlfriend drove away, leaving Best alone in an isolated and unfamiliar area, and without any means to seek help. All told, Defendant took from Best \$998 in cash, an iPhone, and a bookbag containing, *inter alia*, Best's basketball shoes, as well as textbooks valued at approximately \$1,500.

Once Best felt sure that his assailants were gone, he got dressed and started walking. Although Best attempted to hitchhike and "had [his] thumb out" as he walked, he estimated that he nevertheless traveled "about a good ten miles before somebody finally picked [him] up." The driver encouraged Best to report the incident and helped him to contact Detective Matthew Johnson of the Edgecombe County Sheriff's Office.

After Best recounted the events, Detective Johnson's immediate "priority was to locate the crime scene," and he enlisted Best's assistance. Navigating from the backseat of Detective Johnson's vehicle, Best used street signs to direct Detective Johnson "straight to the site." Upon arrival, Detective Johnson observed "fresh tire marks" in the dirt path.

Best provided Detective Johnson with a physical description of the robber, who Best identified as "a cousin," but declined to name. Best's father and grandmother subsequently provided Detective Johnson with Defendant's "complete identity," including his full name and a physical description consistent with that provided by Best.

At Detective Johnson's request, on 23 May 2017, Detective Wade Spruill, Jr., administered a photo lineup to Best. From an array of six photographs of different individuals, Best quickly identified Defendant as the perpetrator of the offenses against him.

On 24 May 2017, a magistrate issued arrest warrants charging Defendant with (i) robbery with a dangerous weapon, (ii) second-degree kidnapping, and (iii) possession of a firearm by a felon. On 7 August 2017, a grand jury returned true bills of indictment formally charging Defendant with the same offenses, along with an additional charge of attaining the status of a habitual felon.

Defendant's case came on for a jury trial in Edgecombe County Superior Court on 26 February 2018, the Honorable Walter H. Godwin, Jr., presiding. At the conclusion of all the evidence, the jury returned verdicts finding Defendant guilty of the three substantive offenses. Defendant subsequently pleaded guilty to attaining the status of a habitual felon. The trial court entered judgments sentencing Defendant to three consecutive terms of 75-102 months in the custody of the

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North Carolina Division of Adult Correction, with 266 days' credit for time served.

Defendant appeals.

Discussion

On appeal, Defendant argues that (1) the trial court erred in denying his motion to dismiss the second-degree kidnapping charge; and (2) Defendant was denied effective assistance of counsel due to his attorney's failure to enter into the record Defendant's stipulation to his prior conviction for felony larceny from the person. We address each issue in turn.

I. Motion to Dismiss

Defendant first argues that the trial court erred by denying his motion to dismiss the second-degree kidnapping charge because the State presented insufficient evidence of the essential element of "removal." We disagree.

A. *Standard of Review*

Upon a criminal defendant's motion to dismiss, "the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980).

"In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (citations omitted). "The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both." *Id.* "Once the court decides that a reasonable inference of [the] defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty." *Id.* (citation and internal quotation marks omitted).

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Moreover, in “ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence.” *Id.* at 596–97, 573 S.E.2d at 869. The trial court must consider “[b]oth competent and incompetent evidence.” *Id.* at 596, 573 S.E.2d at 869 (citation omitted). The defendant’s evidence, however, “should be disregarded unless it is favorable to the State or does not conflict with the State’s evidence. The defendant’s evidence that does not conflict may be used to explain or clarify the evidence offered by the State.” *Id.* (citations and internal quotation marks omitted).

On appeal, we conduct de novo review of the trial court’s denial of a criminal defendant’s motion to dismiss. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

B. Issue Preservation

[1] We must first address the State’s contention that Defendant waived appellate review of his challenge to the trial court’s denial of his motion to dismiss. The State notes that, at trial, Defendant’s motion to dismiss the second-degree kidnapping charge “addressed the specific element of consent and did not present a general challenge to the sufficiency of the evidence as to all elements of the charge.” The State asserts, therefore, that “Defendant failed to preserve the issue of sufficiency of the evidence as to the other elements” of second-degree kidnapping, and accordingly, requests that we dismiss this portion of his appeal.

It is manifest that this Court will not entertain a defendant’s challenge to the sufficiency of the evidence to prove the charged offense, absent a timely motion to dismiss made at trial:

If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, [the] defendant’s motion for dismissal . . . made at the close of [the] State’s evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action . . . at the conclusion of all the evidence, irrespective of whether [the] defendant made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of the motion made at the conclusion of all the evidence.

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However, if a defendant fails to move to dismiss the action . . . at the close of all the evidence, [the] defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

N.C.R. App. P. 10(a)(3).

During the pendency of this appeal, our Supreme Court issued its decision in *State v. Golder*, 374 N.C. 238, 839 S.E.2d 782 (2020), clarifying Rule 10(a)(3)'s preservation requirements for challenges to the sufficiency of the evidence in criminal appeals. In construing Rule 10(a)(3), the *Golder* Court first observed that "our Rules of Appellate Procedure treat the preservation of issues concerning the sufficiency of the State's evidence differently than the preservation of other issues under Rule 10(a)." 374 N.C. at 246, 839 S.E.2d at 788. "[A]lthough Rule 10(a)(3) requires a defendant to make a motion to dismiss in order to preserve an insufficiency of the evidence issue, unlike Rule 10(a)(1)–(2), Rule 10(a)(3) does not require that the defendant assert a specific ground for a motion to dismiss for insufficiency of the evidence." *Id.* at 245–46, 839 S.E.2d at 788.

The Court thus reasoned:

Because our case law places an affirmative duty upon the trial court to examine the sufficiency of the evidence against the accused for every element of each crime charged, it follows that, under Rule 10(a)(3), *a defendant's motion to dismiss preserves all issues related to sufficiency of the State's evidence for appellate review.*

Id. at 246, 839 S.E.2d at 788 (emphasis added).

In the present case, Defendant moved to dismiss the three substantive charges at the close of the State's case-in-chief, and then made *specific* arguments regarding certain elements of each offense. As to second-degree kidnapping, Defendant challenged the sufficiency of the evidence to support one element: consent. Specifically, Defendant argued that dismissal was appropriate because Best testified "that he got in that car willingly. He said [Defendant] kicked him out of the car. [Best] never said that he was kidnapped, that he was taken against his will." Defendant asserted nearly verbatim arguments when he renewed his motion to dismiss at the close of all the evidence.

On appeal, however, Defendant now challenges a different element of kidnapping: the victim's unlawful *removal* from one place to another. The State contends that, by abandoning his trial arguments regarding

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the element of consent, “Defendant failed to preserve the issue of sufficiency of the evidence as to the other elements of kidnapping.” However, as explained above, our Supreme Court’s decision in *Golder* directly forecloses the State’s argument. *See id.* at 249, 839 S.E.2d at 790 (abrogating a long-established line of this Court’s “jurisprudence, which ha[d] attempted to categorize motions to dismiss as general, specifically general, or specific, and to assign different scopes of appellate review to each category,” and deeming those prior decisions “inconsistent with Rule 10(a)(3)”).

“[D]efendant’s simple act of moving to dismiss at the proper time preserved all issues related to the sufficiency of the evidence for appellate review.” *Id.* at 246, 839 S.E.2d at 788. Accordingly, pursuant to our Supreme Court’s holding in *Golder*, this issue is properly before our Court.

C. Evidence of “Removal”

[2] Kidnapping is a specific-intent crime, the elements of which are set forth by statute. *State v. China*, 370 N.C. 627, 637 n.6, 632, 811 S.E.2d 145, 151–52 n.6, 149 (2018). N.C. Gen. Stat. § 14-39 provides, in relevant part:

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

. . . .

(2) Facilitating the commission of any felony or facilitating [the] flight of any person following the commission of a felony[.]

N.C. Gen. Stat. § 14-39(a)(2) (2019).

In that kidnapping is a specific-intent offense, the State must establish “that the defendant unlawfully confined, restrained, or removed” the victim for one of the statutorily enumerated purposes set forth under section 14-39(a). *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986); *see also* N.C. Gen. Stat. § 14-39(a)(1)–(6) (listing the purposes that may provide the specific intent necessary to support a kidnapping charge). “The indictment in a kidnapping case must allege the purpose or purposes upon which the State intends to rely, and the State is restricted at trial to proving the purposes alleged in the indictment.” *Moore*, 315 N.C. at 743, 340 S.E.2d at 404.

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Where the indictment alleges that the defendant kidnapped another person for the purpose of facilitating the commission of a specific felony, N.C. Gen. Stat. § 14-39(a)(2), the State must prove that the defendant acted with “the particular felonious intent alleged.” *State v. White*, 307 N.C. 42, 48, 296 S.E.2d 267, 270 (1982) (citations omitted). “Intent, or the absence of it, may be inferred from the circumstances surrounding the event and must be determined by the jury.” *Id.* at 48, 296 S.E.2d at 271 (citations omitted).

In the instant case, the relevant indictment charged Defendant with kidnapping in the second degree, based on the following allegations:

COUNT II:

The jurors for the State upon their oath present that on or about the date of offense shown and in the county and state named above, the defendant named above, unlawfully, willfully and feloniously did kidnap Zaquinton Best, a person who had attained the age of 16 years or more by unlawfully removing the victim from one place to another, without the consent of the victim, and for the purpose of facilitating the commission of a felony, Robbery with a Dangerous Weapon G.S. 14-87.

Accordingly, to convict Defendant of second-degree kidnapping, the State was required to prove that Defendant unlawfully removed Best from one place to another, without Best’s consent, and for the purpose of facilitating the commission of armed robbery. *Id.* at 48, 296 S.E.2d at 270.

For purposes of N.C. Gen. Stat. § 14-39(a), to unlawfully “remove [a person] from one place to another” requires proof of “a removal separate and apart from that which is an inherent, inevitable part of the commission of another felony.” *State v. Whittington*, 318 N.C. 114, 121, 347 S.E.2d 403, 407 (1986) (citation omitted). “[T]o permit separate and additional punishment where there has been only a technical asportation, inherent in the other offense perpetrated, would violate a defendant’s constitutional protection against double jeopardy.” *Id.* (citation omitted); *cf. State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981) (“[The drugstore employee’s] removal to the back of the store was an inherent and integral part of the attempted armed robbery. To accomplish [the] defendant’s objective of obtaining drugs it was necessary that either [the owner or the employee] go to the back of the store to the prescription counter and open the safe. [The d]efendant was indicted for the attempted armed robbery of both individuals. [The employee’s]

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removal was a mere technical asportation and insufficient to support conviction for a separate kidnapping offense.”).

Whether the evidence supports a removal “separate and apart” from that which is “inherent” to the commission of another felony, or instead merely establishes “a technical asportation,” is a fact-specific determination, made on a case-by-case basis. *See, e.g., Whittington*, 318 N.C. at 121, 347 S.E.2d at 407; *see also State v. Fulcher*, 294 N.C. 503, 522, 243 S.E.2d 338, 351 (1978) (“[I]t was clearly the intent of the Legislature to make resort to a tape measure or a stop watch unnecessary in determining whether the crime of kidnapping has been committed.”).

On appeal, Defendant argues that the trial court erroneously denied his motion to dismiss the second-degree kidnapping charge because the State failed to prove that he “personally committed” the acts constituting Best’s unlawful removal from one place to another. According to Defendant, the evidence demonstrates that he “did not have control over the means used to ‘unlawfully remove’ ” Best, because “Best repeatedly testified that it was [Defendant’s] *girlfriend*, and not [Defendant], who drove them from Walmart to the remote location where the robbery was alleged to have occurred.”¹ (Emphasis added).

In support of his argument, Defendant cites two brief portions of Best’s testimony, including the following exchange during cross-examination:

[DEFENSE COUNSEL:] What kind of car did you say
[Defendant] was driving?

[BEST:] He wasn’t driving. He had the girl with him that
was driving. I think it was like [a] box Lincoln.

A careful and thorough review of the trial transcript reveals that Best’s testimony regarding the driver’s identity was, admittedly, inconsistent. For example, contrary to the statements that Defendant cites favorably on appeal, in the testimony below, Best clearly identifies *Defendant* as the driver:

1. Defendant also argues that because the trial court did not instruct the jury on any theory of vicarious liability, “the State failed to meet its burden of presenting substantial evidence ‘on every essential element’ of the offense of second-degree kidnapping.”

Defendant correctly observes that the State did not request, and the trial court did not deliver, a jury instruction on acting in concert or any other theory of vicarious liability. Yet, as Defendant acknowledges, “the State chose to prosecute [Defendant] as personally responsible for the removal of [Best] in the commission of second-degree kidnapping. *The State could have advanced a vicarious liability theory but it did not.*” (Emphasis added). Accordingly, such an instruction would have been wholly inappropriate in this case.

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[THE STATE:] Okay. Now, tell me about the ride from Walmart. Where did you wind up going?

[BEST:] He said he had to make a quick stop somewhere. Then I said where. He said he was going to show me. *He ended up driving.* I was just sitting back riding. He told me to go in the back seat he had back there. . . .

. . . .

Q. Sir, do you recognize the scene depicted in State's Exhibit 11?

A. Yes, I do.

Q. Where is this?

A. *The road he took me to.* That's the field right there. Those are the boxes. (Indicating.)

(Emphases added).

Notwithstanding Best's lack of clarity regarding the driver's identity, upon Defendant's motion to dismiss, the evidence must be viewed "in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.*" *Scott*, 356 N.C. at 596, 573 S.E.2d at 869 (emphasis added). "In addition, the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence." *Id.*

Viewed in the light most favorable to the State, this evidence supports a finding that Defendant drove from Walmart to the isolated site of the robbery, or alternatively, that both Defendant and his girlfriend drove the car at various times during these events. "While [D]efendant points to alternative inferences that the jury could draw" from Best's testimony on this issue, "the State is not required to exclude all other possible inferences in order to defeat a motion to dismiss." *State v. Davis*, 158 N.C. App. 1, 14, 582 S.E.2d 289, 298 (2003).

In any case, Defendant's suggestion that he could not be convicted of kidnapping if he "did not have control over the means used" to effect Best's unlawful removal—that is, if he did not drive the car—is simply incorrect. It is well settled that "[t]he use of actual physical force or violence is not always essential to the commission of the offense of kidnapping." *State v. Sexton*, 336 N.C. 321, 361, 444 S.E.2d 879, 901 (citations and internal quotation marks omitted), *cert. denied*, 513 U.S. 1006, 130

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L. Ed. 2d 429 (1994). “Threats and intimidation are equivalent” substitutes for the use of force, *id.*, but misrepresentations or deceit may also suffice: indeed, “[a] kidnapping can be just as effectively accomplished by fraudulent means as by the use of force, threats or intimidation.” *State v. Sturdivant*, 304 N.C. 293, 307, 283 S.E.2d 719, 729 (1981) (citations omitted).

Where fraud or misrepresentations “amounting substantially to a coercion of the [victim’s] will” substitute for actual force in effecting a kidnapping—whether by unlawful confinement, restraint, or removal, as in this case—“there is, in truth and in law, no consent at all on the part of the victim.” *State v. Jackson*, 309 N.C. 26, 40, 305 S.E.2d 703, 714 (1983) (citation and quotation marks omitted). To meet its burden of proof, the State must demonstrate “that the fraud or trickery directly induced the victim to be removed to a place other than where the victim intended to be.” *Davis*, 158 N.C. App. at 13, 582 S.E.2d at 297 (citations omitted).

In the present case, on 27 April 2017, Best asked Defendant, his cousin by marriage, to drive him to Walmart, and then to the Community College, because his own vehicle was in the shop. Best told Defendant that he was going to Walmart to cash a check, the funds from which he intended to use for bills and to pay to get his car out of the shop. It is reasonable to infer from these statements that Best’s check was for a significant amount of money. After Defendant agreed to give Best a ride, Defendant, his girlfriend, and Best traveled to Walmart together.

Best entered Walmart alone, cashed his check, and returned to the car approximately ten minutes later. But when he asked Defendant to take him to the Community College as planned, Defendant claimed that “he had to make a quick stop somewhere” first, and he instructed Best to get in the backseat of the car. Because he “trusted” his cousin and still believed that Defendant intended to take him to the Community College, Best complied and “just sat back.” Best grew increasingly concerned, however, as he realized that they were driving in the wrong direction, and he no longer recognized the area; yet, whenever he asked Defendant “where he was going[,]” Defendant only responded, vaguely, that “he was going to show [Best].”

The vehicle eventually pulled off onto a remote dirt path more than 20 miles away from the Walmart, in an isolated area comprising “nothing but open land.” There, Defendant pulled out a gun, ordered Best out of the car, robbed him at gunpoint, and drove away.

It is evident that Defendant’s initial and continuing “trickery directly induced [Best] to be removed to a place other than where [he] intended

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to be.” *Id.* (citations omitted). Defendant fraudulently induced Best to enter the car under the pretext of providing him with a ride to the Community College; it is clear, however, that Defendant never intended to follow through on his illusory offer. “To this extent the action of removal was taken for the purpose of facilitating the felony” of armed robbery. *Whittington*, 318 N.C. at 122, 347 S.E.2d at 407 (citation omitted).

Moreover, Defendant’s lie was quite clearly “designed to remove [Best] from the view of a passerby who might have hindered the commission of the crime.” *Id.* (citation omitted). Defendant’s misrepresentations regarding the parties’ ultimate destination enabled him to remove Best to the secluded location, where Defendant robbed him at gunpoint:

[THE STATE:] Now, what were you thinking when he had the gun pointed at you?

[BEST:] This is the last time I be living. I thought he was going to kill me that day.

Q. Were you afraid?

A. I wasn’t really afraid, but I was nervous. *When we was in the alley if he would have killed me there wouldn’t nobody know.* The whole time, the whole thing [there] weren’t no cars riding by there. *It was like a type of alley you really wouldn’t know.*

Q. Could you see any people at all around?

A. *Huh-Uh. (No.) No cars went by that road.*

(Emphases added). *Cf. id.* at 122, 347 S.E.2d at 408 (“Defendant could have perpetrated the offense when he first threatened the victim. Instead, he chose to remove the victim away from a brightly lit area, near houses and the highway, to a darker, more secluded area. This removal, designed to facilitate [the] defendant’s perpetration of the sexual assault, was not a mere technical asportation.”).

Viewed in the light most favorable to the State, this evidence is more than sufficient to permit a reasonable juror to find that Defendant unlawfully removed Best by means of fraud or trickery, without Best’s consent, for the purpose of facilitating the commission of armed robbery. Therefore, the trial court did not err by denying Defendant’s motion to dismiss the charge of second-degree kidnapping.

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II. Ineffective Assistance of Counsel

[3] Defendant next argues that he received ineffective assistance of counsel because his trial attorney failed to enter into the record Defendant's stipulation to his prior conviction for felony larceny from the person. Because we conclude that the record is insufficient to enable full appellate review on the merits, we dismiss this portion of Defendant's appeal without prejudice to Defendant's right to reassert this claim in a motion for appropriate relief filed with the trial court.

In order to demonstrate ineffective assistance of counsel, a defendant must prove that (1) his trial attorney's "performance was deficient[,] and (2) the deficient performance prejudiced the defense." *State v. Edgar*, 242 N.C. App. 624, 631, 777 S.E.2d 766, 770 (2015) (citation and internal quotation marks omitted). To establish prejudice, the defendant generally "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 631, 777 S.E.2d at 770–71 (citation omitted).

As our appellate courts have consistently reiterated, however, claims for ineffective assistance of counsel generally "should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) (citation omitted), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002).

This is so because on direct appeal, review is limited to the cold record, and the Court is without the benefit of information provided by [the] defendant to trial counsel, as well as [the] defendant's thoughts, concerns, and demeanor that could be provided in a full evidentiary hearing on a motion for appropriate relief. Only when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing will an effective assistance of counsel claim be decided on the merits on direct appeal.

Edgar, 242 N.C. App. at 632, 777 S.E.2d at 771 (citations and internal quotation marks omitted).

Accordingly, on appeal, we must first determine whether the defendant's "ineffective assistance of counsel claims have been prematurely

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brought, in which event we must dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent motion for appropriate relief proceeding." *State v. McNeill*, 371 N.C. 198, 217, 813 S.E.2d 797, 811 (2018) (citation and internal quotation marks omitted), *cert. denied*, ___ U.S. ___, 203 L. Ed. 2d 417 (2019).

Here, Defendant asserts that he received ineffective assistance of trial counsel because his attorney failed to stipulate to his prior conviction for felony larceny from the person. Defendant maintains that due to defense counsel's error, the State subsequently introduced evidence of the nature of this prior conviction in order to prove Defendant's status as a felon, an essential element of the offense of possession of a firearm by a felon, N.C. Gen. Stat. § 14-415.1, and that Defendant was prejudiced as a result. After careful review, we conclude that the record is insufficient to enable appellate review of Defendant's claim.

Just before trial in this matter, the State inquired whether Defendant "would . . . be willing to enter any stipulations pretrial . . . [s]pecifically, as to his felony status as to the felony by firearm charge." Defense counsel responded that he would need to "speak with [his] client first." The trial court agreed and instructed the parties to inform the court of their "decision on that prior to the [S]tate resting. That's what 15A-928 requires." Trial commenced shortly thereafter.

Later, during the State's presentation of evidence, but outside of the presence of the jury, the trial court asked if the parties had determined whether there would be "an admission" pursuant to N.C. Gen. Stat. § 15A-928. Defense counsel replied, "There will be an admission, Your Honor, I will stipulate." Immediately thereafter, the trial court conducted a colloquy with Defendant "concerning [his] . . . reaching the status of a [] habitual felon" and verifying that it was, in fact, Defendant's "plan to admit those prior convictions concerning that indictment." Defendant affirmed his intent to do so through his attorney.

Following the colloquy on Defendant's habitual-felon indictment, but before the jury's return to the courtroom, the State asked: "[R]egarding the possession . . . of a firearm by a felon, will we need a stipulation as to that element as well? Him being a prior convicted felon on that offense." The trial court replied:

THE COURT: Well, upon the conviction of any of the felon[ie]s, that could elevate within that habitual indictment. Basically, I just was asking him is he going to admit the prior convictions and he said that he was. We'll have to make a determination as to the level of the enhanced

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punishment based on any conviction that may or may not be brought back by the jury before we go forward with that issue.

The jury was then returned to the courtroom for further evidence from the State.

The State's penultimate witness was Kimberly Harrell, an assistant clerk for the criminal division of the Edgecombe County Clerk of Superior Court. Harrell's testimony regarding State's Exhibit 9, a true copy of the judgment of Defendant's 16 February 2011 conviction for felony larceny from the person, provides the basis for Defendant's claim for ineffective assistance of counsel. In particular, Defendant complains that "[t]he record reflects no attempt by defense counsel to pre-empt [Harrell's] testimony" regarding Defendant's 2011 conviction. We agree, in that the record is *silent* as to this issue.

Consequently, here, "the cold record reveals that . . . further investigation is required" to enable full and fair review of the merits of Defendant's claim for ineffective assistance of counsel. *McNeill*, 371 N.C. at 217, 813 S.E.2d at 811. Before the State called Harrell to testify, the prosecutor requested that the trial court permit the parties to "approach just real briefly[.]" The court obliged, and the transcript indicates that an "OFF-THE-RECORD DISCUSSION AT THE BENCH" followed. However, the record contains no evidence of the issues and objections raised during this unrecorded bench conference, nor even of its duration.

Accordingly, we conclude that Defendant's claim for ineffective assistance of counsel "ha[s] been prematurely brought," and therefore, we dismiss this portion of Defendant's appeal without prejudice to his right to reassert this claim "during a subsequent motion for appropriate relief proceeding." *Id.*

Conclusion

For the reasons stated herein, the trial court did not err in denying Defendant's motion to dismiss the second-degree kidnapping charge. However, because the record is insufficient to enable our review of Defendant's claim of ineffective assistance of counsel, we dismiss that portion of his appeal without prejudice to Defendant's right to reassert his claim in a motion for appropriate relief filed with the trial court.

NO ERROR IN PART; DISMISSED IN PART.

Judges MURPHY and ARROWOOD concur.

STATE v. WENDORF

[274 N.C. App. 480 (2020)]

STATE OF NORTH CAROLINA

v.

AMANDA WENDORF, DEFENDANT

No. COA20-227

Filed 1 December 2020

1. Contempt—criminal contempt—subpoena—failure to appear

Defendant's failure to appear after being subpoenaed to testify in a trial for assault on a female could be punished as criminal contempt since it constituted a willful disobedience of, resistance to, or interference with a court's lawful process under N.C.G.S. § 5A-11(a)(3).

2. Appeal and Error—criminal contempt—alleged defect in district court's show cause order—collateral attack on superior court's jurisdiction—appellate review

In an appeal from a superior court order finding defendant in criminal contempt, the Court of Appeals determined it had jurisdiction to consider defendant's argument that the district court lacked jurisdiction over the proceeding (due to a facially defective show cause order) because the argument constituted a collateral attack on the superior court's jurisdiction to enter its contempt order.

3. Contempt—criminal contempt—show cause order—pleading requirements—jurisdiction

In a criminal contempt case where defendant failed to appear after being subpoenaed as a witness in an assault on a female trial, the show cause order issued in district court was not facially defective for an alleged failure to comply with the pleading requirements of N.C.G.S. § 15A-924(a)(5) and the trial court had jurisdiction to find defendant in criminal contempt. The requirements of section 15A-924(a)(5) do not apply to proceedings for criminal contempt and the notice requirements for criminal contempt are less demanding than for ordinary criminal cases.

4. Contempt—criminal contempt—district court failure to indicate contempt based on reasonable doubt standard—jurisdiction in superior court

In a case where defendant was held in criminal contempt in district court when she failed to appear after being subpoenaed as a witness, the district court's failure to indicate in its order that it was holding defendant in criminal contempt based on the reasonable

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doubt standard of proof did not deprive the superior court of jurisdiction on appeal from the district court's order.

5. Contempt—criminal contempt—appeal to superior court for de novo review—testimony of district court judge—Rule 605—no neutral or disinterested witness requirement

In the appeal of a district court criminal contempt order to the superior court for a de novo hearing, the superior court did not err by hearing testimony from the district court judge who entered the contempt order. There was no violation of Evidence Rule 605 because the district court judge was not the presiding judge in superior court. Further, even if the district judge was not a neutral or disinterested witness, such witnesses are not prohibited from testifying.

6. Contempt—criminal contempt—findings of fact—supported by the evidence

In a case where defendant was found in criminal contempt for failure to appear after being subpoenaed as a witness in a trial for assault on a female, there was competent evidence to support the trial court's findings that defendant was served with a subpoena instructing her to appear in court, she failed to appear on the date required, and her failure to appear was willful. The testimony showed that the district attorney's office had been in contact with defendant, defendant was personally served with the subpoena, defendant did not answer when the district attorney asked for victims and witnesses to answer during calendar call, and defendant never stood up or identified herself at any time during the criminal session of court.

Judge BERGER concurring by separate opinion.

Appeal by Defendant from order entered 7 November 2019 by Judge Angela B. Puckett in Surry County Superior Court. Heard in the Court of Appeals 7 October 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Ameshia A. Cooper, for the State.

Paglen Law PLLC, by Louise M. Paglen, for the Defendant.

BROOK, Judge.

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[274 N.C. App. 480 (2020)]

Amanda Wendorf (“Defendant”) appeals from the trial court’s order finding her in criminal contempt. We affirm the order of the trial court.

I. Background

Defendant and Jamie Davis were involved in a romantic relationship in 2018 that featured episodes of domestic violence. After one of these episodes, Mr. Davis was charged with assault on a female on 23 June 2018. On 17 August 2018, Defendant was personally served with a subpoena compelling her to appear and testify at Mr. Davis’s trial on 19 September 2018.

On 19 September 2018, the State’s case against Mr. Davis came on for trial in Surry County District Court before the Honorable Marion Boone. The assistant district attorney made a statement at the beginning of the calendar call of cases set for hearing that day, asking that the individuals whose cases were set for hearing identify themselves when their names were called out and that victims and witnesses in the cases also identify themselves. When the assistant district attorney called Mr. Davis’s name, Mr. Davis identified himself, but Defendant did not.

Later in the session of court, the assistant district attorney called Mr. Davis’s case for trial and Mr. Davis approached the defense table. Noting the absence of Defendant, the State’s only witness in the case against Mr. Davis, the assistant district attorney moved for a continuance, but Judge Boone denied the motion. The assistant district attorney therefore took a voluntary dismissal, and the case against Mr. Davis was dismissed. The assistant district attorney then moved that the court order Defendant to show cause why she should not be held in contempt for her failure to appear that day, which Judge Boone granted.

Defendant was personally served with the show cause order and the matter came on for hearing on 2 November 2018. Judge Boone found Defendant in criminal contempt that day and fined her \$250 for her failure to appear on 19 September 2018. On 9 November 2018, Defendant appealed from Judge Boone’s order to superior court.

The matter came on for hearing in Surry County Superior Court on 28 October 2019 before the Honorable Angela B. Puckett. Judge Puckett found Defendant in criminal contempt and fined her \$250 in an order entered on 8 November 2019.

Defendant timely appealed from the superior court’s order to our Court.

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II. Standard of Review

In general, “our standard of review for contempt cases is whether there is competent evidence to support the trial court’s findings of fact and whether the findings support the conclusions of law and ensuing judgment.” *State v. Phair*, 193 N.C. App. 591, 593, 668 S.E.2d 110, 111 (2008) (internal marks and citation omitted). “Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary. The trial court’s conclusions of law drawn from the findings of fact are reviewable de novo.” *State v. Salter*, 264 N.C. App. 724, 732, 826 S.E.2d 803, 809 (2019) (citation omitted). Of course, “[t]he issue of subject matter jurisdiction may be raised at any time, even for the first time on appeal.” *State v. Barnett*, 223 N.C. App. 65, 68, 733 S.E.2d 95, 98 (2012). Because subject matter jurisdiction is an issue of law, review is de novo. *Id.*

III. Analysis

Defendant makes essentially five arguments on appeal, which we address in turn.

A. Failure to Appear

[1] Defendant first argues that the failure to appear and testify when subpoenaed cannot be the basis for a finding of criminal contempt because it does not constitute “[w]illful disobedience of, resistance to, or interference with a court’s lawful process, order, directive, or instruction or its execution.” N.C. Gen. Stat. § 5A-11(a)(3) (2019). We disagree.

Contempts of court are classified in two main divisions, namely: direct and indirect, the test being whether the contempt is perpetrated within or beyond the presence of the court. A direct contempt consists of words spoken or acts committed in the actual or constructive presence of the court while it is in session or during recess which tend to subvert or prevent justice. An indirect contempt is one committed outside the presence of the court, usually at a distance from it, which tends to degrade the court or interrupt, prevent, or impede the administration of justice.

Galyon v. Stutts, 241 N.C. 120, 123, 84 S.E.2d 822, 824-25 (1954) (internal citations omitted). By statute, “[a]ny criminal contempt other than direct criminal contempt is indirect criminal contempt[.]” N.C. Gen. Stat. § 5A-13(b) (2019). Proceedings for criminal contempt are “brought to preserve the power and to vindicate the dignity of the court and to punish for disobedience of its processes or orders.” *Galyon*, 241 N.C. at

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123, 84 S.E.2d at 825. They “are punitive in their nature, and the government, the courts, and the people are interested in their prosecution.” *Id.*

Under Rule 45 of the North Carolina Rules of Civil Procedure, applicable to subpoenas in North Carolina in criminal cases, *see* N.C. Gen. Stat. § 15A-801 (2019), “[f]ailure by any person without adequate excuse to obey a subpoena served upon the person may be deemed a contempt of court[.]” *Id.* § 1A-1, Rule 45(e)(1).¹ Definitionally, a subpoena is “[a] writ or order commanding a person to appear before a court . . . , subject to a penalty for failing to comply.” *Subpoena*, Black’s Law Dictionary 1563 (9th ed. 2009). Accordingly, our Supreme Court has held that willfully refusing to testify when subpoenaed can constitute criminal contempt of court, *In re Williams*, 269 N.C. 68, 75, 152 S.E.2d 317, 323 (1967), as can offering obviously false or evasive testimony, since it is equivalent to the willful refusal to testify, *Galyon*, 241 N.C. at 124, 84 S.E.2d at 825. Similarly, we have held that attempting to persuade a witness to disobey a subpoena and fail to appear constitutes criminal contempt under N.C. Gen. Stat. § 5A-11(a)(3) even where the witness, though frightened, still appears and testifies. *State v. Wall*, 49 N.C. App. 678, 679-80, 272 S.E.2d 152, 153 (1980).

Just as testifying evasively or obviously falsely is equivalent to refusing to testify in willful disobedience to the command of a subpoena, so too is willfully failing to appear when a subpoena compels a witness’s appearance to testify. A valid subpoena is the lawful process of a court. *See Process*, Black’s Law Dictionary 1325 (9th ed. 2009) (defining “process” as “[a] summons or writ, esp. to appear and respond in court”). The failure to appear when ordered is punishable as criminal contempt. *O’Briant v. O’Briant*, 313 N.C. 432, 434-35, 329 S.E.2d 370, 372-73 (1985). We therefore hold that failing to appear when subpoenaed can be punished as criminal contempt because it constitutes “[w]illful disobedience of, resistance to, or interference with a court’s lawful process[.]” N.C. Gen. Stat. § 5A-11(a)(3) (2019).

B. Facial Validity of Show Cause Order

[2] Defendant complains of a number of defects in the district court’s proceeding and order finding her in criminal contempt, many of which

1. Defendant argues that the absence of the word “criminal” in Rule 45(e)(1) means that compliance with subpoenas can only be enforced in proceedings for civil, rather than criminal contempt. N.C. Gen. Stat. § 5A-11(a)(3) has not been interpreted so narrowly, however. *See, e.g., State v. Wall*, 49 N.C. App. 678, 680, 272 S.E.2d 152, 153 (1980) (criminal contempt under N.C. Gen. Stat. § 5A-11(a)(3) upheld where the defendant attempted to intimidate the witness into disobeying subpoena).

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we lack jurisdiction to consider. However, her argument that the district court lacked jurisdiction over the proceeding because the show cause order initiating the proceeding was facially defective is a collateral attack on the jurisdiction of the superior court. Because this assertion, if true, would entail that the superior court lacked jurisdiction to find her in criminal contempt, we have jurisdiction to address it. We reject the argument, though, and hold that the show cause order in district court was not facially defective.

[3] Section 5A-17(a) of the General Statutes of North Carolina provides that “[a] person found in criminal contempt may appeal in the manner provided for appeals in criminal actions, except appeal from a finding of contempt by a judicial official inferior to a superior court judge is by hearing de novo before a superior court judge.” N.C. Gen. Stat. § 5A-17(a) (2019). An appeal under N.C. Gen. Stat. § 5A-17(a) to superior court is not an appeal on the record, however, unlike an appeal to our Court or the Supreme Court. *See State v. Ford*, 164 N.C. App. 566, 569, 596 S.E.2d 846, 849 (2004). While a defendant in a criminal contempt proceeding is not entitled to a jury trial because criminal contempt does not qualify as a serious offense within the meaning of the Sixth Amendment, *Blue Jeans Corp. v. Amalgamated Clothing Workers of Am.*, 275 N.C. 503, 511, 169 S.E.2d 867, 872 (1969), an appeal de novo in superior court of a finding of criminal contempt in district court is otherwise “a new trial . . . from the beginning to the end[.]” *State v. Brooks*, 287 N.C. 392, 405, 215 S.E.2d 111, 120 (1975). “[I]t is as if the case had been brought there originally and there had been no previous trial.” *State v. Sparrow*, 276 N.C. 499, 507, 173 S.E.2d 897, 902 (1970).

Generally speaking, we lack jurisdiction to review a district court’s contempt proceeding, *Jones v. Jones*, 121 N.C. App. 529, 530, 466 S.E.2d 344, 345 (1996), because N.C. Gen. Stat. § 5A-17(a) “vests exclusive jurisdiction in the superior court to hear appeals from orders in the district court holding a person in criminal contempt[.]” *Michael v. Michael*, 77 N.C. App. 841, 843, 336 S.E.2d 414, 415 (1985). Still, “[t]he jurisdiction of the superior court on appeal from a conviction in district court is derivative.” *State v. Wesson*, 16 N.C. App. 683, 689, 193 S.E.2d 425, 429 (1972). If “a court has no authority to act, its acts are void, and may be treated as nullities anywhere, at any time, and for any purpose.” *Corey v. Hardison*, 236 N.C. 147, 153, 72 S.E.2d 416, 420 (1952). And “[w]here a court enters an order without jurisdiction to do so, . . . the appropriate action on the part of the appellate court is to arrest judgment or vacate the order entered without authority.” *State v. Briggs*, 257 N.C. App. 500, 502, 812 S.E.2d 174, 176 (2018) (internal marks and citations omitted).

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Defendant argues that the district court never had jurisdiction to initiate the contempt proceeding because the show cause order was facially defective. N.C. Gen. Stat. § 5A-17(a) does not preclude our review of this issue because if the district court lacked jurisdiction to find Defendant in criminal contempt, so did the superior court, and its order is void. Defendant argues that the defect of the show cause order is that it did not comply with N.C. Gen. Stat. § 15A-924(a)(5), which codifies pleading requirements applicable to criminal cases in superior court. We disagree.

By way of background, there are two kinds of criminal contempt proceedings: summary proceedings, which are for direct criminal contempt, and plenary proceedings, which are for indirect criminal contempt. *See* N.C. Gen. Stat. § 5A-13 (2019). Whereas in plenary proceedings for indirect criminal contempt, a judicial official must “proceed by an order directing the [contemnor] to appear before a judge at a reasonable time specified in the order and show cause why he should not be held in contempt of court[,]” and provide a copy of the show cause order to the contemnor in advance of the hearing, *id.* § 5A-15(a), in summary proceedings, the notice requirement is much more minimal, *id.* § 5A-14(b) (contemnor need only be provided with “summary notice of the charges and a summary opportunity to respond”).

We have observed that in a criminal contempt proceeding, “a show cause order is analogous to a criminal indictment[,]” an observation Defendant makes much of in her argument. *State v. Coleman*, 188 N.C. App. 144, 149, 655 S.E.2d 450, 453 (2008). However, a show cause order is not equivalent to an indictment. *See State v. Revels*, 250 N.C. App. 754, 762, 793 S.E.2d 744, 750 (2016). In fact, in *Revels*, we rejected the same argument Defendant now makes. *Id.* at 763 n.1, 793 S.E.2d at 750 n.1. The reason is that the requirements of N.C. Gen. Stat. § 15A-924(a)(5) do not apply to proceedings for criminal contempt, direct or indirect. The notice requirement in a plenary proceeding for indirect criminal contempt, for example, is much less demanding than in an ordinary criminal case in superior court. *Compare, e.g., Revels*, 250 N.C. App. at 762, 793 S.E.2d at 750 (allowing incorporation by reference to a prior court order in a show cause order for indirect criminal contempt) *with* N.C. Gen. Stat. § 15A-924(a)(5) (requiring, among other things, a separate count for each offense and a factual statement supporting every element of each offense charged). And in a proceeding for direct criminal contempt, the notice requirement is even less demanding, and in some cases, almost nonexistent. *See In re Owens*, 128 N.C. App. 577, 581, 496 S.E.2d 592, 595 (1998), *aff’d*, 350 N.C. 656, 517 S.E.2d 605 (1999) (per

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curiam) (“Notice and a formal hearing are not required when the trial court promptly punishes acts of contempt in its presence.”); *Ford*, 164 N.C. App. at 571, 596 S.E.2d at 850 (observing that some direct criminal contempt proceedings are of such “limited instance [that] there [are] no factual determinations for the court to make.”). Accordingly, we hold that the district court had jurisdiction, and the show cause order was not defective.

C. Standard of Proof

[4] Defendant contends in the alternative that the district court’s failure to indicate that it found she was in criminal contempt based on the reasonable doubt standard of proof is a jurisdictional defect that deprived the superior court of jurisdiction on appeal from the district court’s order. None of the cases cited in Defendant’s brief support this proposition, however. The cases cited in Defendant’s brief support the proposition that proof beyond a reasonable doubt is the standard of proof applicable to criminal contempt proceedings and that the failure to apply the correct standard of proof, or indicate whether the correct standard of proof was applied, is a fatal defect in a superior court’s order of criminal contempt. See *GE Betz, Inc. v. Conrad*, 231 N.C. App. 214, 249, 752 S.E.2d 634, 658-59 (2013); *State v. Phillips*, 230 N.C. App. 382, 386, 750 S.E.2d 43, 45-46 (2013); *State v. Coleman*, 188 N.C. App. 144, 151, 655 S.E.2d 450, 454 (2008); *State v. Ford*, 164 N.C. App. 566, 571, 596 S.E.2d 846, 850 (2004); *State v. Verbal*, 41 N.C. App. 306, 307, 254 S.E.2d 794, 795 (1979). Even where we have observed in dicta that a district court erred by failing to indicate it had applied the correct standard of proof, we have gone on to review the order entered in superior court on appeal from the district court’s order – review that would be precluded if the district court’s failure to indicate whether the correct standard of proof had been applied were an error depriving the superior court of jurisdiction on appeal. *Ford*, 164 N.C. App. at 570-71, 596 S.E.2d at 849-50. We hold that this defect in a district court’s order is not jurisdictional. Accordingly, the superior court was not deprived of jurisdiction on appeal even though the district court’s order did not indicate whether the correct standard of proof was applied.

D. De Novo Review in Superior Court

[5] Defendant next argues that it was plain error for the superior court to allow the judge who presided over the contempt proceeding in district court to testify during the de novo hearing in superior court on appeal from that judge’s order. We hold that admitting this testimony was not error, much less plain error.

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“Plain error analysis applies to [unpreserved] evidentiary matters and jury instructions.” *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634 (2009) (applying plain error standard in assessing admissibility of testimony pursuant to Rule 403); *see also State v. Coleman*, 227 N.C. App. 354, 357, 742 S.E.2d 346, 348 (2013) (“Plain error review is limited to [unpreserved] errors in a trial court’s jury instructions or a trial court’s rulings on admissibility of evidence.”) (quoting *State v. Roache*, 358 N.C. 243, 275, 595 S.E.2d 381, 403 (2004) (alterations omitted)). To demonstrate plain error, the defendant must show that the error had a *probable* impact on the finder of fact’s determination of guilt. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Preserved evidentiary errors, on the other hand, are reviewed for whether “there is a *reasonable possibility* that, had the error in question not been committed, a different result would have been reached[.]” N.C. Gen. Stat. § 15A-1443(a) (2019) (emphasis added).

A witness’s competency to testify is committed to the discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Pope*, 24 N.C. App. 217, 219-20, 210 S.E.2d 267, 269-70 (1974). Demonstrating an abuse of discretion requires “a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision.” *Kearney v. Bolling*, 242 N.C. App. 67, 72, 774 S.E.2d 841, 846 (2015).

Defendant suggests that a district court judge testifying as a witness during a de novo hearing for criminal contempt in superior court constitutes plain error because the district court judge cannot be neutral and disinterested while testifying in an appeal from his or her own ruling. Defendant contends in the alternative that a district court judge testifying at the de novo hearing in superior court violates Rule 605 of the North Carolina Rules of Evidence, which prohibits a judge from testifying in a proceeding over which he or she is presiding. We disagree on both counts.

First, these assertions seem predicated on a misapprehension of the scope of the superior court’s review. As noted previously, de novo review in superior court in an appeal under N.C. Gen. Stat. § 5A-17(a) is “a new trial . . . from the beginning to the end[.]” *Brooks*, 287 N.C. at 405, 215 S.E.2d at 120. “[I]t is as if the case had been brought there originally and there had been no previous trial.” *Sparrow*, 276 N.C. at 507, 173 S.E.2d at 902. District Court Judge Marion Boone was not presiding over the de novo hearing before Superior Court Judge Angela B. Puckett; she was testifying as a witness with knowledge of whether Defendant had failed to appear on 19 September 2018 in her courtroom. While there is a risk of prejudice whenever a judicial official testifies in

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a subsequent proceeding of a case over which he or she has previously presided, offering this testimony does not in and of itself violate Rule 605 of the North Carolina Rules of Evidence. *State v. Lewis*, 147 N.C. App. 274, 279-80, 555 S.E.2d 348, 352 (2001). Rule 605 only prohibits the presiding judge from offering testimony. N.C. Gen. Stat. § 8C-1, Rule 605 (“The judge presiding at the trial may not testify *in that trial* as a witness.”) (emphasis added). In the de novo hearing before Judge Puckett, Rule 605 prohibited Judge Puckett, not Judge Boone, from testifying.

Second, witnesses who are not neutral or disinterested are not categorically prohibited from testifying. Generally speaking, anyone can be a witness. *See id.* § 8C-1, Rule 601(a). While there is an exception for interested witnesses who derive their interest from people who are no longer alive, *id.* § 8C-1, Rule 601(c), trial courts enjoy discretion to guard against the risk of unfair prejudice by excluding testimony, including testimony by judges in prior proceedings of the same case, *Lewis*, 147 N.C. App. at 279-80, 555 S.E.2d at 352, much as they do under Rule 403 of the North Carolina Rules of Evidence,² which are matters within their inherent authority, *Schmidt v. Petty*, 231 N.C. App. 406, 410, 752 S.E.2d 690, 693 (2013). The interest or bias of a witness is a proper subject of cross-examination, *State v. Hart*, 239 N.C. 709, 711, 80 S.E.2d 901, 902 (1954), but does not generally bear on whether the witness is competent to testify, *Albright v. Albright*, 67 N.C. 271, 272 (1870).

Accordingly, we hold that there was no violation of Rule 605 when Judge Boone testified at the hearing over which Judge Puckett presided. Moreover, Judge Puckett’s decision to allow a witness with knowledge to testify about whether Defendant was present in court on 19 September 2018 was not arbitrary or manifestly unsupported by reason. It therefore was not error, much less plain error, for Judge Puckett to allow Judge Boone to testify.

E. The Superior Court’s Findings of Fact

[6] Defendant finally argues that competent evidence did not support the trial court’s findings related to her failure to appear because Judge Boone’s testimony supporting these findings was inadmissible and there was no competent evidence to support the trial court’s finding that her failure to appear was willful. We disagree.

2. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2019) (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

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As noted above, the failure to appear when ordered can constitute willful disobedience punishable as criminal contempt. *O'Briant*, 313 N.C. at 434-35, 329 S.E.2d at 372-73. Furthermore,

[w]here the trial court sits as the finder of fact, and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial court.

This Court can only read the record and, of course, the written word must stand on its own. But the trial judge is present for the full sensual effect of the spoken word, with the nuances of meaning revealed in pitch, mimicry and gestures, appearances and postures, shrillness and stridency, calmness and composure, all of which add to or detract from the force of spoken words.

The trial court's findings turn in large part on the credibility of the witnesses, and must be given great deference by this Court.

Stancill v. Stancill, 241 N.C. App. 529, 531-32, 773 S.E.2d 890, 892 (2015) (citation omitted).

Lindsay Moose, who was employed as a victim coordinator with the Surry County District Attorney's Office on 19 September 2018, testified that she had been in contact with Defendant prior to that date; that Defendant had been personally served with the subpoena requiring her to appear and testify on 19 September 2018; that she called out Defendant's name before court that day; that she heard the assistant district attorney call out Mr. Davis's name and for victims and witnesses in Mr. Davis's case during the calendar call and nobody answered besides Mr. Davis; and that at no point during the criminal session of court on 19 September 2018 did Defendant stand up and identify herself.

Judge Boone testified that she was the presiding judge during the 19 September 2018 session of district court when the State's case against Mr. Davis was called; that the assistant district attorney instructed witnesses and victims to announce themselves when a defendant's name was called during the calendar call; that the assistant district attorney called Mr. Davis's case for trial and then called out Defendant's name twice, and when she did not answer, requested a continuance, which Judge Boone denied; and that the assistant district attorney took a voluntary dismissal of the case when Judge Boone denied his request for a continuance. Judge Boone testified that at no point during the criminal session of court on 19 September 2018 did Defendant stand

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up and identify herself. Notably, Defendant's counsel chose not to cross-examine Judge Boone.

We hold that Ms. Moose and Judge Boone's testimony was competent and admissible evidence supporting the trial court's findings that Defendant was served with a subpoena instructing her to appear in court on 19 September 2018, that she failed to appear on said date, and that her failure to appear was willful. The trial court, having been "present for the full sensual effect of the spoken word, with the nuances of meaning revealed in pitch, mimicry and gestures," and so forth, *Stancill*, 241 N.C. App. at 531, 773 S.E.2d at 892, made findings supported by admissible, competent evidence, and these findings "must be given great deference by this Court," *id.* at 532, 773 S.E.2d at 892.

IV. Conclusion

We affirm the order of the trial court because the failure to appear when subpoenaed is punishable by criminal contempt of court, the superior court had jurisdiction over Defendant's appeal from the district court's finding of criminal contempt, and competent evidence supported the superior court's findings that Defendant failed to appear as subpoenaed and her failure to appear was willful.

AFFIRMED.

Judge ZACHARY concurs.

Judge BERGER concurs by separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur with the majority opinion, but concur in result only with regards to Section D. I write separately because, in that section, the majority should not have considered Defendant's Rule 605 argument. Moreover, the majority incorrectly engages in plain error review on an issue that is within the sound discretion of the trial court.

I. Rule 605

"The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." N.C. Gen. Stat. § 8C-1, Rule 605 (2019).

"Issues not presented in a parties brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C. R. App.

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P. 28(b)(6). Further, “[i]t is not the duty of this Court to supplement an appellant’s brief with legal authority or arguments not contained therein.” *State v. Pabon*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2020).

Defendant’s Rule 605 argument, to the extent there is one, is not that Judge Boone was “presiding at the [hearing].” N.C. Gen. Stat. § 8C-1, Rule 605. Rather, Defendant merely cites to Rule 605 and contends that the trial court deprived him of a fair hearing when it failed to intervene *ex mero motu* to exclude Judge Boone’s testimony. Although no objection is required under Rule 605 to preserve an argument for review, Defendant’s argument is not grounded in Rule 605. Moreover, Defendant provides no legal support for an argument pursuant to Rule 605.

Because Defendant abandoned any argument under Rule 605, he is not entitled to appellate review.

II. Plain Error Review

The majority impermissibly engages in plain error review on an issue that is within the sound discretion of the trial court.

In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4).

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice – that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 516-17, 723 S.E.2d 326, 334 (2012) (*purgandum*).

Our Supreme Court has stated that plain error review is not available on appeal for unpreserved evidentiary issues that fall within a trial court’s sound discretion. *State v. Steen*, 352 N.C. 227, 255-56, 536 S.E.2d

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1, 18 (2000) (“[T]his Court has not applied the plain error rule to issues which fall within the realm of the trial court’s discretion, and we decline to do so now.”).

This Court, following our Supreme Court’s clear direction, has consistently declined plain error review of evidentiary issues that fall within the trial court’s discretion. *See State v. Blankenship*, 259 N.C. App. 102, 125-26, 814 S.E.2d 901, 918-19 (2018) (Dietz, J., concurring) (“[O]ur Supreme Court has held that plain error review does not apply to issues which fall within the realm of the trial court’s discretion”); *State v. Norton*, 213 N.C. App. 75, 81, 712 S.E.2d 387, 391 (2011) (“Because our Supreme Court has held that discretionary decisions of the trial court are not subject to plain error review, we need not address [defendant’s] argument on this issue”); *State v. Cunningham*, 188 N.C. App. 832, 836-37, 656 S.E.2d 697, 700 (2008) (refusing to evaluate Rule 403 balancing test for plain error because it falls within the trial court’s discretion); *State v. Jones*, 176 N.C. App. 678, 687, 627 S.E.2d 265, 271 (2006) (declining to review Rule 403 balancing test because “ ‘[t]his court has not applied the plain error rule to issues which fall within the realm of the trial court’s discretion, and we decline to do so now’ ” (quoting *Steen*, 352 N.C. at 256, 536 S.E.2d at 18)); *State v. Cook*, COA08-628, 2009 WL 678633, *7 (N.C. Ct. App. Mar. 17, 2009) (unpublished) (“[T]he plain error rule is not applicable to issues that are within the trial court’s discretion”). *See generally State v. Smith*, 194 N.C. App. 120, 126-27, 669 S.E.2d 8, 13 (2008) (“[D]iscretionary decisions by the trial court are not subject to plain error review”); *State v. Verrier*, 173 N.C. App. 123, 128-29, 617 S.E.2d 675, 679 (2005) (“Plain error review does not apply to decisions made at the trial judge’s discretion”).

Defendant failed to object at trial to Judge Boone’s testimony. On appeal, Defendant contends that the trial court committed plain error because he was denied a fair hearing in Superior Court when it allowed Judge Boone to testify. However, “[i]t is generally accepted that a judge is competent to testify as to some aspects of a proceeding previously held before him.” *State v. Lewis*, 147 N.C. App. 274, 280, 555 S.E.2d 348, 352, (2001) (citation and quotation marks omitted). Further, “it is within the trial court’s discretion to allow or not allow a judicial official to testify.” *Id.* at 280, 555 S.E.2d at 352.

The majority acknowledges that the competency of Judge Boone to testify is a matter within the trial court’s sound discretion. Nonetheless, the majority impermissibly engages in plain error review and lays the foundation for the expanded use of plain error review of evidentiary issues that fall within a trial court’s sound discretion. If our Supreme

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Court intended to overturn *Steen* and the multitude of cases from this Court, it would have done so expressly. Until our Supreme Court takes that step, we are bound by the clear wording of *Steen* and the published cases from this Court.

JUSTIN WAYNE WARD, PLAINTIFF

v.

JESSICA MARIE HALPRIN, DEFENDANT

No. COA19-1065

Filed 1 December 2020

1. Child Custody and Support—custody order—joint legal custody—mother given final decision-making authority regarding major issues

In a custody matter in which the trial court gave two parents joint legal custody of their children but primary physical custody to the mother, the trial court did not err by giving the mother final decision-making authority over major issues with regard to the children in the event the parents could not reach a mutual agreement. The court's determination that giving the mother final authority over certain decisions was in the children's best interest was supported by its findings of fact, which included details about the parents' inability to communicate and co-parent and the effect of that inability on the children.

2. Attorney Fees—custody action—father to pay mother's attorney fees—N.C.G.S. § 50-13.6—sufficiency of findings and conclusions

In a child custody action, the trial court did not err by ordering the father to pay the mother's attorney fees where the court's findings and conclusions were in accordance with N.C.G.S. § 50-13.6. The unchallenged findings showed that the mother was awarded child support and arrears, acted in good faith, had insufficient means to defray the costs of the action, and incurred reasonable attorney fees, while the father failed to pay adequate child support and had the ability to pay attorney fees.

Judge MURPHY dissenting.

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Appeal by plaintiff from orders entered 24 October 2018 and 2 May 2019 by Judge Aretha V. Blake in Mecklenburg County District Court. Heard in the Court of Appeals 12 August 2020.

Wofford Law, PLLC, by J. Huntington Wofford and Rebecca B. Wofford, for plaintiff-appellant.

Fox Rothschild, LLP, by Michelle D. Connell, and Tom Bush Law Group, by Tom Bush and Rachel Rogers Hamrick, for defendant-appellee.

YOUNG, Judge.

This appeal arises out of orders for child custody and child support. The trial court did not err in ordering that Mother has final decision-making authority on all major issues involving the minor children. The trial court also did not err in ordering Father to pay Mother's attorney's fees. Accordingly, we affirm the decision of the lower court.

I. Factual and Procedural History

Justin Wayne Ward ("Father") and Jessica Marie Halprin ("Mother"), are the parents of two minor children. Mother and Father were married but separated on 3 November 2013. On 7 November 2014, Father filed for divorce, and on 3 June 2015, he filed for child custody and child support seeking full physical and legal custody of the minor children. The parties executed a Memorandum of Judgment outlining the terms for shared (50/50) custody on a temporary basis, then transferred the venue from Davie County to Mecklenburg County, North Carolina.

On 18 August 2015, Father filed a Motion for Temporary Restraining Order and Preliminary Injunction regarding unilateral decisions Mother was making regarding the minor children. On 11 September 2015 and 14 September 2015, Mother filed a Motion for a Temporary Parenting Arrangement and a Motion to Dismiss Father's Request for Preliminary Injunction. On 19 February 2016, the trial court entered its Order on Temporary Parenting Arrangement. On 24 October 2018, the trial court entered an Order for Permanent Child Custody and Permanent Child Support granting both parents joint legal custody of the minor children, granting Mother permanent primary physical custody of the minor children, and requiring Father to pay child support. Father filed timely written notice of appeal.

Post-trial motions resulted in the entry of an Order Granting Motion for Rule 52 Relief and an Amended Order Permanent Child Custody and

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Child Support on 2 May 2019. In this Order, the trial court's findings of fact include that "[b]oth parties are fit and proper to have input into major decisions impacting the minor children," but that "[i]t is in the best interest of the minor children that the primary custodial parent have final decision-making authority where the parents cannot reach a mutual agreement." Although the trial court awarded joint legal custody, Mother was awarded the ability to make decisions "concerning the general welfare of the minor children, not requiring emergency action, including, but not limited to, education, religion, and non-emergency major medical treatment." The trial court found that "[b]oth Mother and Father have close, loving relationships with the minor children." However, both parents have made unilateral decisions which have made co-parenting ineffective. Father filed timely written notice of appeal from these orders.

II. Standard of Review

"Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 795, 798 (2006). An award for attorney's fees is also reviewed for an abuse of discretion. *In re Clark*, 202 N.C. App. 151, 168, 688 S.E.2d 484, 494 (2009). "An abuse of discretion is shown only when the court's decision is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Barton v. Sutton*, 152 N.C. App. 706, 710, 568 S.E.2d 264, 266 (2002).

III. Child Custody

[1] Father contends that the trial court erred in ordering that Mother has final decision-making authority on major issues involving the minor children. We disagree.

"[T]he General Assembly's choice to leave 'joint legal custody' undefined implies a legislative intent to allow a trial court 'substantial latitude in fashioning a 'joint legal custody arrangement.'" *Diehl v. Diehl*, 177 N.C. App. 642, 647, 630 S.E.2d 25, 28 (2006). "This grant of latitude refers to the trial court's decision to distribute certain decision-making authority that would normally fall within the ambit of joint legal custody to one party rather than another based upon the specifics of the case." *Id.* "This Court must determine whether, based on the findings of fact below, the trial court made specific findings of fact to warrant a division of joint legal authority." *Hall v. Hall*, 188 N.C. App. 527, 535, 655 S.E.2d 901, 907 (2008).

In this case, the trial court made findings of fact which support its conclusion regarding legal custody. The findings of fact include: Mother

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has more one-on-one interaction with the minor children's school; Mother makes significant efforts to maintain the minor children's connections with Father's family; the minor children are excelling academically; the parties have not been able to co-parent effectively; one of the minor children was significantly impacted by Mother and Father's inability to communicate; Mother made the unilateral decision to put the children in camp during Father's custodial time; Father refused to provide Mother with travel information for the children and failed to return the children at the agreed-upon time; Mother has been a constant presence and source of care for the children; Father's new marriage will be a new transition as he plans to move out of state, but he is willing to maintain a Charlotte residence to exercise his parenting time; both parents are fit and proper to have input on major decisions impacting the minor children; it is in the best interest of the minor children that the primary custodial parent have final decision-making authority where the parties cannot reach a mutual agreement; and the minor children attend a diverse school that is open to involvement with both parents. Based upon the findings of fact, the trial court concluded as a matter of law that "[i]t is in the best interest of the minor children for Mother to be granted primary custody, for Father to be given reasonable parenting time, and for the parties to have joint legal custody."

As required by *Diehl*, the trial court found that it is in the best interest of the minor children for the primary custodial parent to have final decision-making authority and found facts as to why Mother should have primary custody. As required by *Hall*, the trial court made findings of fact detailing past disagreements by the parties which illustrate their inability to communicate and the actual effect their contentious communications had on the minor children. Father has failed to show that the trial court's decision giving Mother final decision-making authority on major issues involving the children was manifestly unsupported by reason or that it could not have been the result of a reasoned decision. Accordingly, the trial court did not err.

IV. Attorney's Fees

[2] Father contends that the trial court erred in ordering him to pay attorney's fees to Mother. We disagree.

North Carolina General Statute §50-13.6 allows for counsel fees in actions for custody and support of minor children:

In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for

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custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

N.C. Gen. Stat. §50-13.6 (2020). Where the trial court did not make any findings or conclusions as to mother's good faith, it was sufficient that the evidence showed that she was an interested party acting in good faith. *Lawrence v. Tise*, 107 N.C. App. 140, 153, 419 S.E.2d 176, 185 (1992). "A party seeking attorney's fees must also show that the child support action [] was resolved in his favor." *Kowalick v. Kowalick*, 129 N.C. App. 781, 788, 501 S.E.2d 671, 676 (1998). Here, Mother was awarded child support and arrears.

Father does not challenge any specific finding of fact. Instead he contends only that Mother is not statutorily entitled to attorney's fees for her child custody and child support claims. Since Father did not challenge any of the findings of fact, they are deemed to be supported by competent evidence and are binding on appeal. The trial court made findings of fact to support the conclusion of law that "Mother is entitled to an award of attorney's fees for prosecuting her claims for child support and child custody, and her Motion to Compel."

The findings included Mother's attorneys' hourly rates, the customary fee for like work, the experience and ability of the attorneys, that Mother has insufficient means to defray the suit, that Mother was acting in good faith, that Father failed to pay adequate child support, that Mother has incurred reasonable attorney's fees, and that Father has the ability to pay. The findings and conclusions are in line with N.C. Gen. Stat. §50-13.6. Father failed to show that the trial court's decision was manifestly unsupported by reason or that it could not have been the result of a reasoned decision. Accordingly, the trial court did not err in ordering Father to pay attorney's fees.

AFFIRMED.

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Judge TYSON concurs.

Judge MURPHY dissents.

MURPHY, Judge, dissenting.

I respectfully dissent from the Majority as the trial court erred in both awarding Mother the final decision-making authority without necessary supporting findings of fact and in ordering Father to pay Mother's attorney's fees where Mother had the resources to defray the expense of the suit.

A. Child Custody

The Majority properly relies on *Hall v. Hall*, 188 N.C. App. 527, 655 S.E.2d 901 (2008) and *Diehl v. Diehl*, 177 N.C. App. 642, 630 S.E.2d 25 (2006) in concluding the trial court must make specific findings of fact to warrant a division of joint legal decision-making authority. *Supra* at 496-97. However, the Majority concludes the trial court's specific findings of fact were sufficient to warrant an unequal division of joint legal decision-making authority. *Supra* at 497. I disagree.

"Legal custody" generally refers to the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare. *See Patterson v. Taylor*, 140 N.C. App. 91, 96, 535 S.E.2d 374, 378 (2000); 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 13.2b at 13-16 (5th ed. 2002) ("If one custodian has the right to make all major decisions for the child, that person has sole 'legal custody.' "). As a general matter, the trial court has "discretion to distribute certain decision-making authority that would normally fall within the ambit of joint legal custody to one party rather than another based upon the specifics of the case." *Diehl*, 177 N.C. App. at 647, 630 S.E.2d at 28. In order to exercise its discretion the trial court must make "sufficient findings of fact to show that such a decision was warranted." *Id.* The trial court failed to do so. Here, the trial court found both parents are fit and proper to have input on major decisions impacting the minor children. Despite this, the trial court awarded Mother final decision-making authority. This decision conflicts with our prior caselaw which holds both parents must be granted equal decision-making authority for issues related to the minor children, unless the trial court explicitly makes findings of fact appropriate to justify unequal decision-making authority. *See Diehl*, 177 N.C. App. at 647-648, 630 S.E.2d at 28-29.

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In *Diehl*, the trial court found both parents were fit and proper to have joint legal custody of the minor children and granted primary physical custody to the mother and permanent joint legal custody to both the mother and father, noting the mother has “primary decision[-]making authority.” If a particular decision will have a substantial financial effect on the father either party may petition the Court to make the decision, if necessary. *Id.* at 646, 630 S.E.2d at 28. There, the trial court’s findings of fact included:

[T]he parties are currently unable to effectively communicate regarding the needs of the minor children . . . the children have resided only with [mother], and [father] has exercised only sporadic visitation; [father] has had very little participation in the children’s educational and extra-curricular activities; [mother] has occasionally found it difficult to enroll the children in activities or obtain services for the children when [father’s] consent was required, as his consent is sometimes difficult to obtain; and when [child’s] school recommended he be evaluated to determine whether he suffered from any learning disabilities, [father] refused to consent to the evaluation unless it would be completely covered by insurance.

Id. at 647, 630 S.E.2d at 28. In determining whether the trial court erred by awarding the parties joint legal custody while simultaneously granting mother primary decision-making authority, we held:

[A]lthough the trial court awarded the parties joint legal custody, the court went on to award “primary decision-making authority” on all issues to [mother] unless “a particular decision will have a substantial financial effect on [father]. . . .” In the event of a substantial financial effect, however, the order still does not provide [father] with any decision-making authority, but rather states that the parties may “petition the Court to make the decision” Thus, the trial court simultaneously awarded both parties joint legal custody, but stripped [father] of all decision-making authority beyond the right to petition the court to make decisions that significantly impact his finances. We conclude that this approach suggests an award of “sole legal custody” to [mother], as opposed to an award of joint legal custody to the parties.

Id. at 646, 630 S.E.2d at 28. We reversed the trial court’s ruling awarding primary decision-making authority to the mother and remanded for

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further proceedings regarding the issue of joint legal custody. *Id.* at 648, 630 S.E.2d at 29.

Relying on *Diehl*, in *Hall*, we reiterated “upon an order granting joint legal custody, the trial court may only deviate from ‘pure’ legal custody after making specific findings of fact.” *Hall*, 188 N.C. App. at 535, 655 S.E.2d at 906. “The extent of the deviation is immaterial . . . [we] must determine whether, based on the findings of fact below, the trial court made specific findings of fact to warrant a division of joint legal authority.” *Id.* Findings which support the conclusion to award primary *physical* custody to one parent are not enough. *Id.* at 535, 655 S.E.2d at 906-07. When a trial court determines both parents are fit and proper persons to be awarded joint legal custody, then both parents must be granted equal decision-making authority for issues related to the minor children, unless the trial court explicitly makes findings of fact appropriate to justify unequal decision-making authority.

In the case before us, the Majority concludes, in relevant part, “the trial court made findings of fact which support its conclusion regarding legal custody.” *Supra* at 496. In support of this statement, the Majority refers to the following findings of fact:

34. Mother has more one-on-one interaction with the minor children’s school. . . .

35. Mother makes significant efforts to maintain the minor children’s connections with Father’s family, including paternal grandfathers, aunts, and cousins. The minor children have a positive, close and loving relationship with maternal grandparents with whom the minor children and Mother currently reside.

. . .

42. The minor children are excelling academically.

43. The parties have not been able to co-parent effectively since their separation as both parties have unilaterally made decisions regarding the minor children. Mother has made unilateral decisions about the minor children’s school and camps. Father has made unilateral decisions related to issues related to custody exchange, including changing the times and locations of exchanges.

44. In the Fall of 2015, the minor child Paxton was significantly impacted by the parties’ inability to communicate

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when both parents enrolled the minor child in different schools and the child, in fact, attended the first week of school at two separate schools. Based on the credible evidence presented to the [c]ourt, Mother was aware that Father did not know that she had enrolled the minor child at Concord First Assembly School, and allowed Father to send the minor child to Dilworth Elementary School for an entire week knowing Paxton had already started school elsewhere.

45. In June of 2017, Mother unilaterally signed the children up for a camp that impeded on Father's custodial time.

46. In July of 2017, Father refused to provide Mother with substantive travel information for the children and unreasonably failed to return the minor children to Mother at the agreed-upon exchange time. In addition, Father frequently changes the exchange location at the last minute.

...

48. Throughout the transitions, Mother has been a constant presence and source of care for the minor children.

49. Father's [new] marriage [] will constitute an additional transition in the near future. Father is committed to building a new life with [his fiancé] in Tennessee. . .[but] Father intends to maintain [a] Charlotte residence to exercise his parenting time in Charlotte if necessary.

...

51. Both parties are fit and proper to have input into major decisions impacting the minor children. It is in the best interest of the minor children that the parties confer and discuss verbally or in writing, major issues relating to the minor children.

52. It is in the best interest of the minor children that the primary custodial parent have final decision-making authority where the parties cannot reach a mutual agreement.

The trial court's findings of fact do not support stripping Father of his decision-making authority. Similar to the findings in *Diehl*, the findings here predominately address the trial court's reasons for awarding

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Mother primary *physical* custody of the children. *See Diehl*, 177 N.C. App. at 647, 630 S.E.2d at 29 (“These findings, however, predominately address the trial court’s reasons for awarding [mother] primary physical custody of the children . . . ‘Decisions exercised with physical custody involve the child’s routine, not matters with long-range consequences.’”). When the findings addressing reasons for awarding physical custody are removed, all we are left with are facts pertaining to the parties’ inability to communicate and their tumultuous relationship. *Hall* and *Diehl* rejected the proposition that such findings alone are enough to warrant an unequal split in decision-making authority.

The Majority asserts “[a]s required by *Hall*, the trial court made findings of fact detailing past disagreements by the parties which illustrate their inability to communicate and the actual effect their contentious communications have had on the minor children.” *Supra* at 497. In support of this conclusion, the Majority refers to Findings of Fact 43-46, which state:

43. The parties have not been able to co-parent effectively since their separation as both parties have unilaterally made decisions regarding the minor children. Mother has made unilateral decisions about the minor children’s school and camps. Father has made unilateral decisions related to issues related to custody exchange, including changing the times and locations of exchanges.

44. In the Fall of 2015, the minor child Paxton was significantly impacted by the parties’ inability to communicate when both parents enrolled the minor child in different schools and the child, in fact, attended the first week of school at two separate schools. Based on the credible evidence presented to the Court, Mother was aware that Father did not know that she had enrolled the minor child at Concord First Assembly School, and allowed Father to send the minor child to Dilworth Elementary School for an entire week knowing Paxton had already started school elsewhere.

45. In June of 2017, Mother unilaterally signed the children up for a camp that impeded on Father’s custodial time.

46. In July of 2017, Father refused to provide Mother with substantive travel information for the children and unreasonably failed to return the minor children to Mother at

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the agreed-upon exchange time. In addition, Father frequently changes the exchange location at the last minute.

These findings of fact show the parties' difficulty communicating with each other and their difficulty obtaining consent from one another when making decisions regarding the well-being of their children, as well as how these actions have affected at least one of their minor children. These findings of fact are insufficient to support an order abrogating the decision-making authority Father otherwise enjoys under joint legal custody. *See Carpenter v. Carpenter*, 225 N.C. App. 269, 280, 737 S.E.2d 783, 791 (2013) ("[J]oint custody implies a relationship where each parent has a degree of *control* over, and a measure of responsibility for, the child's best interest and welfare.").

While the trial court's order provides a "process" for Mother and Father to consult on decision-making via email or other written correspondence and a follow-up telephone call, Mother still has final decision-making authority on all major issues, leaving Father without recourse. So long as Mother goes through the steps of sending an email or responding to an email and having one phone call with Father, she can unilaterally make all major decisions for the children and still be in compliance with the trial court's order. The trial court erred by awarding veto power in decision-making responsibilities to Mother after awarding joint legal custody to both parties. This "process" does not remedy that error. The trial court's ruling regarding the unequal distribution of decision-making authority should be remanded for further proceedings regarding the issue of joint legal custody.

B. Attorney's Fees

An attorney's fees award pursuant to N.C.G.S. § 50-13.6 requires the party seeking the award to (1) be an interested party acting in good faith, and (2) have insufficient means to defray the suit. *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 723-24 (1980). "Whether these statutory requirements have been met is a question of law, reviewable [de novo] on appeal." *Id.* at 472, 263 S.E.2d at 724. Further, the trial court's findings regarding whether the statutory requirements have been met must be supported by competent evidence. *Id.* Here, there is insufficient evidence in the Record to support a finding that Mother has insufficient means to defray the expense of the suit.

1. Standard of Review

The Majority's analysis of attorney's fees under an abuse of discretion standard of review is incomplete because the Majority has not

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reviewed whether the statutory requirements under N.C.G.S. § 50-13.6 have been satisfied. *Supra* at 496. While “[w]e typically review an award of attorney’s fees under N.C.[G.S.] § 50-13.6 (2016) for abuse of discretion[,] . . . when reviewing whether the statutory requirements under [N.C.G.S. §] 50-13.6 are satisfied, we review *de novo*.” *Sarno v. Sarno*, 255 N.C. App. 543, 548, 804 S.E.2d 819, 824 (2017) (discussing attorney’s fees and N.C.G.S. § 50-13.6 in the context of child support). If we determine the statutory “requirements have been met[,] . . . the standard of review change[s] to abuse of discretion for an examination of the amount of attorney’s fees awarded[,]” not before. *Sarno*, 255 N.C. App. at 548, 804 S.E.2d at 824. “In addition, the trial court’s findings of fact must be supported by competent evidence.” *Conklin v. Conklin*, 264 N.C. App. 142, 144, 825 S.E.2d 678, 680 (2019) (upholding an award of attorney’s fees when trial court found the mother had insufficient means to defray the expense of the suit). “Only when these requirements have been met does the standard of review change to abuse of discretion for an examination of the amount of attorney’s fees awarded.” *Schneider v. Schneider*, 256 N.C. App. 228, 229, 807 S.E.2d 165, 166 (2017); *see also Sarno*, 255 N.C. App. at 548, 804 S.E.2d at 824.

2. Statutory Requirements

Attorney’s fees can be awarded to the prevailing party in a child custody or support case when the party acts in good faith and has insufficient means to defray the expense of the suit. *See* N.C.G.S. § 50-13.6 (2019). N.C.G.S. § 50-13.6 provides:

In an action or proceeding for the custody or support, or both, of a minor child . . . the court may in its discretion order payment of reasonable attorney’s fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney’s fees to an interested party as deemed appropriate under the circumstances.

N.C.G.S. § 50-13.6 (2019). In order to satisfy the requirements of N.C.G.S. § 50-13.6 for awarding attorney’s fees in a custody and support action,

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“[t]he facts required by the statute must be alleged and proved” to support the order, namely that the interested party “is (1) acting in good faith and (2) has insufficient means to defray the expense of the suit.” *Hudson*, 299 N.C. at 472, 263 S.E.2d at 723-24. The Majority affirmed the award of attorney’s fees after concluding there was no abuse of discretion; however before we can apply an abuse of discretion standard of review, we must first address whether the trial court properly complied with the mandate of N.C.G.S. § 50-13.6, which is a question of law subject to de novo review. *Supra* at 498.

a. Good Faith

In determining good faith under N.C.G.S. § 50-13.6, the trial court is “in the best position to evaluate the merits and sincerity of the claims of both parties and to determine whether [the party] was acting in good faith.” *Conklin*, 264 N.C. App. at 149, 825 S.E.2d at 682-83. “[A] party satisfies [the good faith element] by demonstrating that he or she seeks custody in a genuine dispute with the other party.” *Id.* at 145, 149, 825 S.E.2d at 680, 683. Here, the trial court made Findings of Fact 78 and 79 in the *Amended Order Permanent Child Custody and Permanent Child Support*:

78. Mother is an interested party acting in good faith who does not have sufficient means as set forth in the Findings of Fact as to her income and expenses.

79. The [c]ourt finds that Mother acted in good faith as she was the spouse originally sued and has prevailed on her child custody and child support claims, who does not have sufficient means to defray the expense of this action and is entitled to an award of attorney’s fees to be paid by Father pursuant to the North Carolina General Statutes.

Mother demonstrated she sought custody and support in a genuine dispute with Father. I agree with the Majority in so much as it determined Mother was an interested party acting in good faith.

b. Insufficient Means to Defray the Expense of the Suit

Having determined Mother acted in good faith, we must next determine if the trial court erred in concluding she had insufficient means to defray the expense of the suit, here, her attorney’s fees. In accurately summarizing our law on this issue, *Lee’s North Carolina Family Law* states:

The court may award attorney’s fees only to a party who does not have sufficient means to defray the costs of the

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action. A party has insufficient means to defray the costs of the action where the party is unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit.

In determining whether a party has insufficient means, the trial court should examine the party's estate, income, and debts. Courts have found sufficient means where the requesting party had a separate estate of \$930,484[.00], with debts of \$264,831[.00] and the defendant had a separate estate of \$747,553[.00], with debts of \$254,612[.00]; where the gross incomes of plaintiff and defendant and their current spouses were similar; and where the requesting party had \$27,000[.00] in a savings account.

A party may be found to have insufficient resources to defray costs even if he or she has assets that could be sold to pay attorney's fees. The courts have recognized that a party should not have to unreasonably deplete his or her estate in order to pay these fees. For example, if a parent's only asset is the parties' former marital home, a finding that he or she does not have sufficient means to defray the costs of the action should be upheld.

Likewise, if the [R]ecord shows that the obligee has been paying all of the uninsured medical expenses and that she has outstanding balances on those expenses at the time of the hearing, there is sufficient evidence of insufficient means. On the other hand, if the facts reveal that the obligee has a separate liquid estate of \$88,000[.00], *the court must make a finding on whether resort to the separate estate would be an unreasonable depletion of that estate.*

The [appellate] courts have interpreted [N.C.G.S. § 50-13.6] to allow the trial court to compare the estates of the parties in making this determination. The court may compare the estates, for example, when the court is determining whether the depletion of the petitioner's estate would be reasonable or unreasonable. A comparison of the individual estates is not required where the evidence is clear that there would be no unreasonable depletion. The court may decide not to compare estates, for example, when the monthly income of the party seeking attorney's fees exceeds monthly expenses and the party has a large estate and no debts.

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2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 10.72 at 602-03 (5th ed. 1999 & Supp. 2018) (internal citations and quotation marks omitted) (emphasis added). Thus, the trial court must make a two-step analysis in determining whether a party has insufficient means to defray the costs of the action: (1) would the payment of attorney's fees deplete the party's estate, and (2) if the payment of attorney's fees would deplete the party's estate, would the depletion be reasonable or unreasonable?

In determining Mother's estate, income, and debts, there is sufficient evidence in the Record to support the conclusion the payment of Mother's attorney's fees is a gift and not a debt. When asked about the payment of Mother's legal fees, Mother's parent testified

[Father's Counsel]: Are you paying for [Mother's] legal fees?

[Mother's parent]: Yes, I am.

[Father's Counsel]: How much have you paid so far, approximately?

[Mother's parent]: I'm going to say over \$150,000[.00].

[Father's Counsel]: Has [Mother] signed any promissory notes in regard to that?

[Mother's parent]: No.

[Father's Counsel]: Are you requiring her to pay that back?

[Mother's parent]: No.

Therefore, the payment of Mother's attorney's fees is a gift, not a debt, and must be considered as part of her assets and estate. The trial court failed to take into account the impact of this gift on Mother's estate and further, did not inquire if Mother's payment of attorney's fees would deplete this estate. Additionally, the trial court failed to determine whether the depletion would be reasonable or unreasonable. The trial court did not properly satisfy the statutory requirements and therefore the issue should be remanded to the trial court to make a finding regarding whether Mother's payment of her attorney's fees would or would not be an unreasonable depletion of her estate.

CONCLUSION

The trial court erred in awarding Mother final decision-making authority without the necessary supporting findings of fact. This

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issue should be remanded to the trial court to make specific findings of fact regarding whether a warrant of unequal division of joint legal decision-making authority is justified. Further, the trial court did not satisfy the statutory requirements in awarding Mother attorney's fees. For these reasons, I must dissent.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 DECEMBER 2020)

HAUSER v. BROOKVIEW WOMEN'S CTR., PLLC No. 19-1073	Forsyth (16CVS860)	No Error
IN RE I.S.M. No. 20-1	Yadkin (18JA27)	Affirmed
IN RE J.S. No. 20-540	Pitt (17JB101)	Vacated and Remanded
N.C. STATE BAR v. ERICKSON No. 20-245	N.C. State Bar (18DHC46)	Affirmed
NOWAK v. METRO. SEWERAGE DIST. OF BUNCOMBE CNTY. No. 19-797	Buncombe (17CVS4548)	Affirmed
PRICE v. BOCCARDY No. 20-127	Ashe (18CVD43)	Affirmed
RADIATOR SPECIALTY CO. v. ARROWOOD INDEM. CO. No. 19-507	Mecklenburg (13CVS2271)	Affirmed in part; Dismissed in part
STATE v. BURLESON No. 20-379	McDowell (15CRS51148)	Reversed and Remanded
STATE v. CHRISCOE No. 20-63	Moore (17CRS52617)	No Error
STATE v. DANIELS No. 20-242	Wake (17CRS214884-86) (19CRS1832)	NO PREJUDICIAL ERROR
STATE v. ESSARY No. 19-917	Onslow (17CRS53569-70) (18CRS726)	No error in part, vacated in part
STATE v. GARNER No. 20-253	Randolph (18CRS52126) (18CRS52127)	NO ERROR IN PART; DISMISSED IN PART; DISMISSED WITHOUT PREJUDICE IN PART
STATE v. HARGETT No. 19-960	New Hanover (17CRS50468) (17CRS50474-75)	No Error

STATE v. HARRIS No. 19-1013	Union (17CRS052891)	No Error
STATE v. HAYNES No. 20-21	Columbus (16CRS050225) (16CRS50373) (16CRS50374)	No error in part; Vacated and remanded in part
STATE v. HINSON No. 19-245	Union (14CVS888) (18CRS920) (18CRS923)	Vacated and Remanded
STATE v. JENKINS No. 20-90	Mecklenburg (03CRS215620-21)	Affirmed; Remanded for Correction of Clerical Errors; Motion for Appropriate Relief Allowed and 03 CRS 215621 Remanded for Correction of Judgments.
STATE v. LOPEZ No. 19-823	Lincoln (17CRS53755)	No Error
STATE v. McINTYRE No. 19-407	Union (17CRS52022) (18CRS270)	No Error
STATE v. McKINNIE No. 19-1082	Mecklenburg (16CRS244124) (16CRS244125-26) (17CRS21140)	No Error
STATE v. PARULSKI No. 19-673	Wake (17CRS213316-17)	No Error
STATE v. SANDY No. 19-918	Wake (18CRS209112-118)	No Error
STATE v. SAPP No. 20-117	Guilford (18CRS89697) (19CRS25151)	No error in part, Dismissed without prejudice in part
STATE v. SHORE No. 20-168	Davidson (16CRS53938-40)	No Error
STATE v. URISINI No. 19-1163	Union (17CRS50196) (17CRS51845)	Affirmed

STATE v. VINING No. 20-51	Brunswick (18CRS50599)	No Error
STATE v. WATERFIELD No. 19-813	Pasquotank (16CRS702)	No Error
STATE v. WOOD No. 20-222	Guilford (18CRS90865) (18CRS90867-68) (19CRS25185)	Affirmed in part; dismissed in part.
THOMPSON v. DEPT OF TRANSP. No. 19-72	Cumberland (15CVS2896)	Affirmed in Part, Remanded in part
WILLIAMS v. MARYFIELD, INC. No. 19-804	Guilford (17CVS4138)	Affirmed in Part; Vacated and Remanded in Part

